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No. _____

In The

Supreme Court of the United States

October Term, 1994

M. HAROLD EZZONE AND
PATRICIA L. LAROSA,

Petitioners,

v.

WILLIS M. HANSEN, DENNIS B. HANSEN,
AND STATE BANK OF LAWLER,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Iowa

PETITION FOR WRIT OF CERTIORARI OF M. HAROLD EZZONE AND PATRICIA L. LAROSA

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QUESTIONS PRESENTED FOR REVIEW

I. Until this case, the Iowa supreme court afforded a common law judicial review of the fact-findings with respect to punitive damages. However, in this case, acting on what it characterized as a "rule mandated" by *Honda Motor Co., Ltd. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331, 129 L.Ed.2d 386 (1994), the Iowa supreme court changed its manner of review. Under this change, it took charge of the fact-findings by making them anew as to the amount of punitive damages, thereby applying vague factors to the evidence that neither the jury, nor the trial court had been asked to or did apply. It thereby rendered findings which were both plainly arbitrary and unreviewable.

Therefore, within this context, the question presented for review is: By eliminating any review of punitive damages fact-findings, including common law review, has the Iowa supreme court violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

II. In this case, no party questioned the legal correctness of the punitive damage instruction given to the jury. Before the verdict, the only challenge to submitting punitive damages to the jury was to the sufficiency of the evidence to show legal malice. After the verdict, no party challenged the amount of the punitive damages verdicts or judgments, and no party sought remittitur. Yet, after the appeal was argued and submitted, the Iowa supreme court applied factors, upon which the jury had not been instructed and of which the parties had had no

QUESTIONS PRESENTED FOR REVIEW – Continued

advance warning, to reduce unilaterally the punitive damages by a drastic 80%-99%.

Therefore, within this context, the question presented for review is: By raising the punitive damage reduction issue *sua sponte* and resolving it *ex parte*, has the Iowa supreme court violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

LIST OF ALL PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed were Ronald Riccardi, Precision of New Hampton, Inc., Willis M. Hansen, Dennis B. Hansen, State Bank of Lawler, M. Harold Ezzone, and Patricia L. LaRosa.

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REFERENCE TO REPORTS OF OPINIONS DELIVERED IN THIS CASE

On 11/12/92, 5/28/93, and 6/28/93, the Iowa district court for Chickasaw County rendered judgments on jury verdicts. These judgments were filed with the clerk of that court, but not otherwise reported.

On 9/21/94, the Iowa supreme court rendered an opinion. It has been reported as *Ezzone v. Riccardi*, 525 N.W.2d 388 (Iowa 1994).

On 12/15/94, the Iowa supreme court rendered an order denying rehearing, but amending its prior opinion. It has been reported as *Ezzone v. Riccardi*, 525 N.W.2d 403 (Iowa 1994).

On 1/4/95, the Iowa supreme court rendered an order denying petitioners' motions to clarify, rehear, and reconsider. This order was filed with the clerk of that court, but not otherwise reported.

On 1/11/95, the Iowa supreme court rendered an order denying petitioners' second motion to clarify and/or to reconsider. This order was filed with the clerk of that court, but not otherwise reported.

STATEMENT OF THE JURISDICTIONAL GROUNDS

On 9/21/94, the Iowa supreme court rendered the opinion sought to be reviewed. On 12/15/94, the Iowa supreme court rendered an order denying the petitioners' petitions for rehearing, but amending the 9/21/94 opinion. This petition is being filed within ninety days of the 12/15/94 order.

The statutory provision believed to confer jurisdiction on this court to review the amended opinion is 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The following constitutional provision is involved in this case:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Section 1, Amendment 14, Constitution of the United States.

STATEMENT OF THE CASE

In 1983, M. Harold Ezzone, ("Ezzone"), and Patricia L. LaRosa, ("LaRosa"), were husband and wife. They lived in Florida where they had built a torque convertor factory and business from scratch. They both had limited education and business acumen. However, they were both hard workers, and Ezzone was a resourceful mechanic and inventor.

In that year, Ezzone and LaRosa met Ronald Riccardi, ("Riccardi"). Promising an infusion of capital and sound business advice, he took over their financial affairs, both personal and business. They came to depend on and trust him so much that each formed a confidential relationship with Riccardi. They did not realize until it was too late that Riccardi was a confidence man.

In 1985-86, Riccardi established a second location and separate corporation for the torque convertor business in Iowa. The State Bank of Lawler, Willis M. Hansen, and Dennis B. Hansen, (the "Hansens"), helped Riccardi in

this establishment as the bank, bankers, and insurance agent for the business, Ezzone, and LaRosa. Thereby, they became intimately familiar with the business and its owners' lives. In fact, Willis M. Hansen attended the business organizational meeting on 3/14/86, at which time he obtained for the bank the documents which showed Ezzone and LaRosa as the equal shareholders and directors of the business.

Riccardi drove a wedge between Ezzone and LaRosa. In 9/86, LaRosa fled penniless to Florida and did not return to Iowa. She had been placed in a position of having to trust Riccardi and Ezzone to safeguard her interests in the business. Riccardi, however, manipulated Ezzone psychologically to hide the Iowa business from LaRosa in their divorce. The Hansens substantially aided Riccardi in this hiding. Riccardi also bankrupted the Florida business and left LaRosa to cope with the consequences.

On 11/11/86, the Iowa business burned to the ground. An insurance company paid the business approximately $1,000,000 for the loss. At that time, the business had debts of approximately $350,000, mostly to the Hansens. Riccardi convinced Ezzone that he had to leave Iowa to pretend that he did not own the business and to so state under oath in the Florida divorce proceedings with LaRosa. Ezzone did so in 12/86.

While Ezzone was gone and with the Hansens' assistance, Riccardi took all the insurance money out of the State Bank of Lawler, except the money the Hansens unilaterally took to pay back their unmatured loans. Some of the money Riccardi took was used to rebuild the business. Acting as the reputed business owner, Riccardi then sold the rebuilt business to the Hansens for $250,000. The Hansens helped Riccardi personally pocket this money.

The Hansens bought the business, (which they had coveted from the beginning), based upon a blatantly-

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The Hansens bought the business, (which they had coveted from the beginning), based upon a blatantly-

bogus document signed by Riccardi alone. At trial, they were absolutely unable to explain the basis upon which Riccardi supposedly had obtained LaRosa's 50% ownership, (a matter not covered even in the document). Likewise, Ezzone gave them no reason to think that he had transferred his 50% ownership to Riccardi.

When Ezzone returned in the spring, 1987, neither the Hansens, nor Riccardi would permit him access to the business, his home, or his personal belongings. Thereafter, the Hansens carried on an extensive coverup of their wrongdoings. This coverup included contact with LaRosa by which Willis Hansen untruthfully told her that Ezzone had abandoned the business.

In 1988, Ezzone finally was able to start a lawsuit for his losses against Riccardi and the Hansens. In 1991, LaRosa joined this lawsuit. In their pleadings, each claimed punitive damages, but neither claimed a specific amount for the same. On 10/12/92, a jury was impaneled. (By trial, Riccardi had disappeared from Iowa.) On 11/6/92, after deliberating for the better part of a week, a Chickasaw County jury returned 28 special verdicts in which it answered 148 questions submitted to it as the finder of facts.

By these verdicts, the jury determined that the Hansens and Riccardi were liable to Ezzone and LaRosa for losses in connection with their ownership of the torque convertor business(es), a duplex, and personal belongings. The liability was predicated on the commission, or concert of action to commit, three intentional torts, namely confidential relationship breach, intentional contractual interference, and conversion.

By these verdicts, the jury further determined that Ezzone and LaRosa had sustained a $675,000 compensatory damage loss at the hands of the Hansens, for which the latter were jointly and severally liable. The jury further determined that Riccardi's and the Hansens' legal

malice was such that the following punitive damages were warranted:

Ronald Riccardi to LaRosa,	$3,000,000;
Ronald Riccardi to Ezzone,	$2,000,000;
Willis M. Hansen to LaRosa,	$ 450,000;
Willis M. Hansen to Ezzone,	$ 180,000;
State Bank of Lawler to LaRosa,	$ 365,000;
State Bank of Lawler to Ezzone,	$ 180,000;
Dennis B. Hansen to LaRosa,	$ 59,900;
Dennis B. Hansen to Ezzone,	$ 25,672.

The total of the punitive damages so determined against the Hansens was $1,260,572. It was approximately two times greater than the $675,000 in compensatory damages.

The net worths of the Hansens were stipulated at trial to be: $6,319,086, Willis M. Hansen; $7,623,000, State Bank of Lawler; $815,175, Dennis B. Hansen. Thus, the punitive damage verdicts represented the following net worth ratios: 10%, Willis M. Hansen; 7%, State Bank of Lawler; 10.5%, Dennis B. Hansen.

On 12/16/92, the Hansens moved for judgment notwithstanding the verdicts and for new trial. Thereby, they did not challenge specifically the amount of the punitive damages or seek remittitur. Instead, they made the following generalized challenge to the proof of the underlying legal malice:

> (f) The plaintiffs presented no substantial evidence from which the jury could find clear and convincing evidence to support their claim for punitive damages under any allegations in their petition. The Plaintiffs' evidence does not support a jury verdict for finding either legal malice or willful and wanton disregard for the rights of another. . . . (12/16/92 motions, p. 3.)

This was the same challenge they had made in their pre-verdict motions for directed verdict:

> 12. Plaintiffs' claim for punitive damages should be dismissed. There is no clear and convincing evidence in this case to establish legal malice on the part of this Defendant. (11/3/92 Willis M. Hansen's motion for directed verdict, p. 5, being identical to 11/3/92 Dennis B. Hansen's & State Bank of Lawlers' motions for directed verdict, p. 5; *see also*, 10/27/92 tr., pp. 1907-1909.)

This also was the same challenge they had made in their objection to instruction #54, the punitive damage instruction. (10/30/92 tr., p. 1992.)

On 5/28/93, the trial court entered three orders. In one, it entered specific dollar judgments for compensatory and punitive damages, thereby declaring that all intentional torts were components of and thus merged into the intentional tort of confidential relationship breach. In another, the trial court denied the Hansens' motion for judgment notwithstanding the verdict and for new trial under the following rationale:

> This jury was presented with an extremely complex case with extensive instructions and twenty-eight special verdicts encompassing seventy pages. They were attentive throughout the length of this trial and spent a considerable amount of time in deliberations before reaching a verdict in this matter. The Court is satisfied that this verdict was the result of thoughtful discussions and the award is not the result of improper passions or prejudice. The award is supported by sufficient evidence in the record and was not excessive or clearly against the weight of the evidence. (5/28/93 order, p. 2.)

On 6/28/93, the trial court entered a final order adjusting the judgment amounts by a *pro tanto* credit.

On 6/28/93, Ezzone and LaRosa filed appeal notices. On 6/29/93, the Hansens filed a cross appeal notice. In their appellate briefs, the Hansens did not assign as error any excessiveness in the amounts of punitive damages or any failure to grant remittitur, (the same also being unpreserved in their pre-verdict and post-verdict motions). (12/6/93 Hansens' brief in Ezzone appeal, pp. 42-46; 12/6/93 Hansens' brief in LaRosa appeal, pp. 32-38.)

On 9/21/94, the Iowa supreme court entered its decision. (app. pp. 1-34.) It affirmed the compensatory damages judgment: "Because we cannot say there is no substantial evidence supporting plaintiffs' claims, and because the case was submitted on instructions without objections by defendants' trial counsel, we affirm the findings of liability and compensatory damages." (app. p. 3.) It also affirmed the legal malice findings of fact:

> The cases make it clear that punitive damages are awarded, not because a plaintiff deserves them, but as a punishment, to deter the defendant and others from repeating similar outrageous conduct. In the light of this purpose, and accepting, as we must, plaintiff's version of the evidence, we cannot say an award of punitive damages was inappropriate. (app. p. 22)

By these affirmances, the Iowa supreme court rejected all the assignments of errors raised by the Hansens.

Having done so, however, it did not cease its appellate review:

> In accordance with a rule now mandated by the United States Supreme Court, we review and reduce the punitive damage awards. . . .
>
> We note, however, that we are now obliged as a matter of constitutional law to assume responsibility for reviewing the appropriateness of the size of punitive damage awards. Since our *Spaur* decision, the United States Supreme Court

> has decided it is a denial of due process for a state to allow punitive damages without according appellate review of the appropriateness of the amount. *Honda Motor Co., v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331, 2338-41, ___ L.Ed.2d ___, ___ (1994). Although no constitutional question is presented here, we take the *Oberg* holding as a signal to order remittitur if appropriate. (app. pp. 3, 23.)

Thereupon, it announced a new factor, ("provocation"), that it would consider during its review of the case:

> This and future reviews will be conducted on the basis of principles previously announced in punitive damages cases. Awards will be tested with a view of the extent and nature of the outrageous conduct, the amount necessary for future deterrence, and with deference to the relationship between the punitive award and plaintiff's injury, as reflected in any award for compensatory damages. In addition to these traditional factors, we shall consider all circumstances surrounding the conduct and relationship between parties. Any provocation of the conduct by plaintiff will be a factor. *See* Restatement (Second) of Torts §908 cmt. e (1979). We take the provocation to include participation in the conduct complained of. (app. p. 23.)

It included the "provocation" factor in its review, even though the jury had not been directed to consider such a factor in the punitive damage instruction and even though the Hansens had not objected to the non-inclusion of such a factor in instruction #54, given to the jury as follows:

> Punitive damages may be awarded against either or all of Ronald Riccardi, Willis M. Hansen, Dennis B. Hansen, the State Bank of Lawler, and Precision of New Hampton, Inc., for any conduct which constituted a willful and

wanton disregard for the rights of another and caused actual damage to M. Harold Ezzone or Patricia L. LaRosa.

Punitive damages are not intended to compensate for injury but are allowed to punish and discourage the defendant and others from like conduct in the future.

There is no exact rule to determine the amount of punitive damages, if any, you should award. In fixing the amount of punitive damages, you may consider all the evidence including:

1. The nature of the defendant's conduct.
2. The amount of punitive damages which will punish and discourage like conduct by the defendant in view of his or its financial condition.
3. The actual damages sustained.

(11/6/92 instructions)

Then, without explaining how it applied the new "provocation" factor to the evidence or ever declaring that the jury's fact-finding was the result of some extrinsic force upon proper decisionmaking, such as passion or prejudice, the supreme court declared that its fact-findings should replace those of the jury's:

> Upon our mandated review, we consider the punitive award here to be greatly excessive. *Although Ezzone convinced the jury* he was manipulated by Riccardi into undertaking his deceitful conduct, *we think the record clear, for punitive damages purposes,* that his participation was provoking as well as provoked. *We think* that punitive damages awarded him are out of proportion to any amount needed, in addition to compensatory awards, for deterrence purposes. (app. pp. 23-24, *emph. supp.*)

Upon those fact-findings, (and similar ones related to LaRosa), it then reduced the punitive damages judgments

against the Hansens, (but not the much larger punitive damages judgments against Riccardi), as follows:

Willis M. Hansen to LaRosa, $450,000 to $90,000, an 80% reduction;

Willis M. Hansen to Ezzone, $180,000 to $18,000, a 90% reduction;

State Bank of Lawler to LaRosa, $365,000 to $1,000, a 99.7% reduction;

State Bank of Lawler to Ezzone, $180,000 to $1,000, a 99.45% reduction;

Dennis B. Hansen to LaRosa, $59,000 to $6,000, an 89.84% reduction;

Dennis B. Hansen to Ezzone, $25,672 to $2,500, a 90.27% reduction. (app. pp. 7, 24.)

This amounted to a total reduction from $1,260,572 to $118,500, or a 90.6% total reduction.

On 10/7/94, Ezzone and LaRosa filed rehearing petitions. (app. pp. 35-63.) In his petition, Ezzone specifically raised the federal question of whether he had received due process notice and opportunity to be heard before being deprived of the property of his punitive damages judgment. (app. pp. 40-49.) He further raised the federal questions of whether he had been deprived of a due process review of a punitive damages fact-finding, as well as the non-arbitrary application of non-vague standards to the evidence in the fixing of punitive damages:

> – What exactly constitutes "provocation", (opin., at 26), and given its victim orientation, just what is its nexus to punishment and deterrence of the willful wrongdoer?
>
> – At exactly what point does the court abandon appellate review on assigned error under the "traditional factors" and begin *de novo* fact-finding under "all circumstances surrounding the conduct and relationship between the parties", (opin., at 26)?

> – In short, does not the absence of clear review standards, coupled with unreviewable appellate fact-finding, create just as much of an unconstitutional risk of arbitrary punitive damages awards, as did the Oregon law which provided no meaningful appellate review of jury fact-finding? (app. pp. 49.)

In his petition, Ezzone incorporated by reference the contents of LaRosa's petition. (app. p. 40.)

In her petition, LaRosa raised the federal question of whether there was any federal constitutional mandate for the supreme court of Iowa to change the manner in which it reviewed punitive damages judgments or to reduce the amount of her judgment. (app. pp. 57-58.) She also raised federal questions concerning due process notice, opportunity to be heard, certainty in the decisionmaking standards, and the necessity of review over punitive damage fact-finding. (app. pp. 55-58.) In her petition, LaRosa incorporated by reference the contents of Ezzone's petition. (app. p. 54.)

On 11/10/94, Ezzone filed a reply to the Hansens' resistance to his rehearing petition. He drew particular attention to the facts that the supreme court of Iowa had determined the amount of punitive damages by considering factors different than those which the jury had been instructed to consider and that the Hansens had not objected to the punitive damages instruction as not identifying all the factors to be considered, (facts found to be controlling in its liability/compensatory damages affirmances under the "law of the case"). On 11/10/94, LaRosa filed a reply which incorporated Ezzone's reply by reference.

On 12/15/94, the supreme court filed an order denying and overruling the rehearing petition. (app. pp. 64-69.) This order did not specifically address any of the federal questions raised, *(id.)*, except to the extent that it concluded that because the Hansens had preserved and

assigned as error the sufficiency of the evidence of punitive damages, they necessarily had assigned as error the extent of punitive damages. (app. pp. 65-66.) This order also amended the 9/21/94 opinion by giving Ezzone and LaRosa a remittitur choice of accepting the reduced punitive damages or a new trial. (app. pp. 67-68.)

On 12/20/94, Ezzone and LaRosa filed motions in which they asked the Iowa supreme court to clarify whether the new trial was on all issues or on the punitive damages amount issue alone. On 12/22/94, 12/23/94, and 12/30/94, Ezzone and LaRosa moved the Iowa supreme court to reconsider and/or rehear whether the appellate remittitur should be vacated and the case remanded to the trial court to determine the issues of excessiveness and the amounts of punitive damages to be reduced. (app. pp. 70-80.) On 12/31/94, LaRosa moved the Iowa supreme court to clarify, for the purposes of instructing at new trial, what it meant by provocation and to identify what evidence existed in the record to show that LaRosa had provoked the Hansens into committing or participating in intentional torts against her. She further moved that failing such an identification, the Iowa supreme court reconsider its reduction of her punitive damage awards. Ezzone and LaRosa joined in each other's motions.

On 1/4/95, the Iowa supreme court filed an order clarifying that the new trial choice was on all issues and otherwise denying all pending motions. (app. pp. 81-83.)

On 1/4/95, Ezzone filed a second motion to clarify and/or reconsider. (app. pp. 84-109.) On 1/4/95, LaRosa filed a joinder in this motion. In the motion, Ezzone requested the supreme court to render clarifications in response to the following questions:

> (A) On remand, may a new jury award more in punitive damages against the Hansens than those found "to be greatly excessive" and "out of proportion to any amount needed, in

addition to compensatory awards, for deterrence purposes. . . . " and if so, under what circumstances?

(B) Pursuant to this court's disclosure standards, as reflected in its *Larew* opinion, what evidence was controlling in the decision to remit the punitive damages awarded to Ezzone by 90%-99.45%?

(C) Pursuant to this court's disclosure standards, as reflected in its *Larew* opinion, what evidence was controlling in the finding that Ezzones's "participation ['in the conduct complained of'] was provoking as well as provoked. . . . "? (app. p. 90.)

On 1/11/95, the Iowa supreme court filed an order denying all pending motions without clarification. (app. pp. 110-111.) On 1/13/95, its clerk issued *procedendo*.

On 1/26/95, Ezzone and LaRosa filed remittitur acceptances with the trial court. (app. pp. 111-120.) In these remittiturs, they explained why they believed that the refusals to clarify and the requirements of a new trial on all issues constituted a mandated reduction of punitive damages without any realistic or meaningful alternative. (app. pp. 112-115, 118-119.)

ARGUMENT

I. BY BECOMING THE PUNITIVE DAMAGES FACT-FINDER, THE IOWA SUPREME COURT DENIED PETITIONERS A DUE PROCESS JUDICIAL REVIEW FOR ARBITRARINESS.

A. Constitutional Background. To date, this Court has identified two relationships between the Fourteenth Amendment and punitive damages fact-finding. It has assented to "the proposition that the Fourteenth Amendment imposes a substantive limit on the amount of a

punitive damages award." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. ___, ___, 113 S.Ct. 2711, 2719, 125 L.Ed.2d 366, ___ (1993); *accord, Honda Motor Co., Ltd. v. Oberg*, ___ U.S. ___, ___, 114 S.Ct. 2331, 2335, 129 L.Ed.2d 386, ___ (1994). It also had held that "denial of judicial review of the size of punitive damage awards violates the Due Process Clause of the Fourteenth Amendment." *Oberg*, 114 S.Ct., at 2341.

In identifying these relationships, the primary focus of this court has been on whether the afforded due process adequately protected against the arbitrary fact-finding of punitive damages. For example, in *TXO*, 113 S.Ct., at 2718, the plurality opinion authored by Justice Stevens noted a prior opinion in which "the Court actually set aside a penalty imposed on a telephone company on the ground that it was so 'plainly *arbitrary* and oppressive' as to violate the Due Process Clause." (*emph. supp.*) In *TXO*, 113 S.Ct., at 2725, the concurring opinion authored by Justice Kennedy agreed that the Constitution's "fundamental guarantee is that the individual citizen may rest secure against *arbitrary or irrational* deprivations of property." (*emph. supp.*) In *TXO*, 113 S.Ct., at 2731, the dissenting opinion authored by Justice O'Connor also agreed that a punitive damages "award that is 'plainly *arbitrary* and oppressive,' *cit.* . . . or 'so severe and oppressive as to be wholly *disproportioned to the offense* and obviously unreasonable,' *cit.*, offends the Due Process Clause and may not stand." (*emph. supp.*)

Likewise, in *Oberg*, 114 S.Ct., at 2335, the majority opinion authored by Justice Stevens recognized at the outset that "we are confronted with the question of what procedures are necessary to ensure that punitive damages are not imposed in an *arbitrary* manner." (*emph. supp.*) It then posited its decision on the removal of procedures which protected against arbitrary fact-finding:

> Oregon's abrogation of a well-established common law protection against *arbitrary* deprivations of property raises a presumption that its procedures violate the Due Process Clause. . . .
>
> When the absent procedures would have provided protection against *arbitrary* and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process. . . .
>
> Oregon has removed that safeguard, [judicial review], without providing any substitute procedure and without any indication that the danger of *arbitrary* awards has in any way subsided over time. For these reasons we hold that Oregon's denial of judicial review of the size of punitive damage awards violates the Due Process Clause of the Fourteenth Amendment. *Oberg*, 114 S.Ct., at 2339, 2340, 2341 (*emph. supp.*).

B. Core Problem in this Case. Within the primary focus on arbitrary fact-finding, this Court usually has discussed jury fact-finding. However, it has not exempted judicial fact-findings from this focus: "One must concede that unlimited jury discretion or *unlimited judicial discretion – in the fixing of punitive damages – may invite extreme results that jar one's constitutional sensibilities. Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, ___, 111 S.Ct. 1032, 1043, 113 L.Ed.2d 1, ___ (1991). It also had not exempted a judicial role with respect to review of the fact-finding: "The appellate review makes certain that the punitive damages are *reasonable in the light of their purpose to punish* what has occurred *and to deter* its repetition." *Id.*, 111 S.Ct., at 1045, (*emph. supp.*).

Indeed, in considering this role in a concurring opinion, Justice Kennedy brushed up against the core problem which infects this case, namely judicial review which in reality becomes arbitrary and unreviewable fact-finding of punitive damages by substitution:

> To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? The answer excessive in relation to the conduct of the tortfeasor may be correct, but it is unhelpful, for we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. *A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damage award* in deciding whether the award violates the Constitution. *This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend. TXO, supra,* 113 S.Ct., at 2725.

In this case, Ezzone and LaRosa believe that Justice Kennedy's hypothetical possibility has become unconstitutional reality. In direct response to what it characterized as a "rule now mandated by the United States Supreme Court . . . " (in *Oberg*, app. pp. 3, 23), the Iowa supreme court came more than "close to relying on its own subjective reaction to a particular punitive damages award." It in fact "relied" on its "own subjective reaction" to find as fact the maximum amount of punitive damages it deemed reasonable within the record. Thereby, it acted in a manner far more "fickle" than the common-sense jury process it claimed to be correcting.

In so acting, the Iowa supreme court also abandoned the very common law procedure for arbitrariness review declared in *Oberg* to be essential due process. Ironically, it replaced this common law review with a judicial fact-finding which was subject to no arbitrariness review whatsoever and which left Ezzone and LaRosa with an unreviewable, yet arbitrary fact-finding of punitive damages.

C. Departures From Common Law Review. To appreciate just how radical and activistic the departures of the Iowa supreme court were from traditionally-approved procedures embodying "fundamental fairness", it is necessary to consider, *infra*, the record made.

In this record, the trial judge who experienced the evidence live, (along with the jury), was asked by the Hansens to review the verdicts, *vis-a-vis* the evidence. He did so in light of the synonymous common law standards of gross excessiveness, passion and prejudice, and against the weight of the evidence. *Accord, Oberg*, 114 S.Ct., at 2341, 2349; *TXO*, 113 S.Ct., 2725; *Haslip*, 111 S.Ct., at 1038-1039, 1055. As a matter of discretion, he then found as fact that the verdicts readily met all of those standards under the evidence, (and accordingly converted the verdicts into the property of judgments):

> The Court is satisfied that this verdict was the result of the thoughtful discussions and the award was not the result of improper passions or prejudice. The award is supported by sufficient evidence in the record and was not excessive or clearly against the weight of the evidence. (5/28/93 orders.)

On appeal, the Iowa supreme court did not review or overturn this finding for abuse of discretion. (app. pp. 3, 22-24.) In fact, it did not even mention this finding. (*Id.*) Apparently, therefore, it viewed this common law review by a judge in a superior position to view the evidence as having no relevance to its new mode of review.

In this record, the trial judge also instructed the jury on the common law purposes for imposing punitive damages, namely punishment and deterrence. *See, Haslip*, 111 S.Ct., at 1042, 1044, 1045. On appeal, the Iowa supreme court, however, took into account some alien notion of comparative fault by the victims. (app. p. 23.) It called the notion "provocation". (*Id.*) Unfortunately, although Ezzone and LaRosa repeatedly requested the Iowa

supreme court to clarify this notion, or at least explain how it could be reconciled with the common law purposes, it declined to do so. (app. pp. 40, 48-49, 54, 64-68, 81-82, 90, 105-109, 110.) It instead left the notion of provocation largely ensconced within its undisclosed caprice and whim.

In this record, the Iowa supreme court replaced the common law review in the light most favorable to Ezzone and LaRosa with a *de novo* form of review by which it substituted its fact-findings of punitive damages for those of the jury's:

(1) After fabricating the ambiguous, unusual, and unprecedented factor of victim provocation, it acknowledged that the jury had found as fact Ezzones's version of the facts, *viz.* that he had not provoked the Hansens: "Ezzone convinced the jury he was manipulated by Riccardi into undertaking his deceitful conduct . . . " (app. pp. 23-24.) Without explication of the evidence or reasoning upon which it relied, it then rejected the jury's fact-finding and substituted its own: "We think the record clear, *for punitive damages purposes*, that his participation was provoking, as well as provoked." (app. p. 24.) (*emph. supp.*)

(2) It next rejected the jury's fact-finding of the punitive damage amounts needed to deter misconduct such as had been perpetrated on Ezzone: "We think that the punitive damages awarded him are out of proportion to the damages needed for deterrence purposes." (*Id.*) It offered no review, however, of the amounts needed to punish the Hansens' misconduct. (*Id.*) Instead, without further displayed rationale, it found as fact that the punitive damages needed were "no more than the . . . " $21,500 it found. (*Id.*)

(3) It next rejected the implicit jury fact-finding that LaRosa had not provoked the Hansens into victimizing her and substituted its own fact-finding: "LaRosa's conduct was not subject to the same criticism as Ezzone's,

but the record does clearly show she backed Ezzone's misrepresentations about the business to the Hansen defendants." (*Id.*) This substituted finding was inconsistent with the implicit jury findings that Riccardi, not Ezzone or LaRosa, had made misrepresentations to the Hansens in early 1986, before the Iowa business was created, and that these misrepresentations had nothing to do with the theft by Riccardi and the Hansens of this business from LaRosa, (absent from Iowa and any contact with the Hansens after 9/86), in late 1986 and 1987. (*See*, app. pp. 60-61.)

(4) Finally, it rejected the jury's fact-finding of the punitive damages amounts needed to deter conduct such as had been perpetrated on LaRosa: "In addition we think the punitive damages awarded to her, as was the case with Ezzone's, are out of proportion to any amount needed for deterrence purposes." (app. p. 24.) It again offered no review of the amounts needed to punish the Hansens' misconduct. For that matter, it also did not explain why it fact found that the punitive damages to LaRosa should be reduced by similar percentages as those to Ezzone, even though they were considerably different amounts. (*Id.*) Instead, without further displayed rationale, it found as fact that the punitive damages were "no more than the . . . " $97,000 it found. (*Id.*)

In this record, the Iowa supreme court also took affirmative measures to assure that its fact-findings would not be the subject of subsequent review, common law or otherwise. These measures were in addition to the structural fact that there is no tribunal in the Iowa court system which reviews decisions by the Iowa supreme court.

One of those measures was to force on Ezzone and LaRosa the choice between a new trial on all issues and the drastically-reduced punitive damages. This forced choice was "arbitrary and irrational", given that the jury had resolved the liability and compensatory damages

issues by segregated special verdicts and that the Iowa supreme court separately had affirmed those special verdicts.

This forced choice also constituted the conscious erection of a review barrier. The first jury already had awarded the maximum compensatory damages. The record reflected that Ezzone, who has had cystic fibrosis since he was young, already had outlived his life expectancy by many years. The subject of this litigation was the misappropriation of all his worldly goods, way back in 1986-1987. He had been involved in this litigation to recover for this misappropriation since 1988. LaRosa had been involved since 1991. Therefore, it was obvious that neither could afford years more of litigation, at the same time risking loss of the maximum compensatory damages which had been awarded, affirmed, and should have been available to finance a second trial on punitive damages alone, but for the unnecessary barrier.

The Iowa supreme court further made the choice it gave no choice at all by refusing to clarify whether a second jury could contradict the court's fact-finding. (app. pp. 90, 93-96, 110.) That is, it made Ezzone and LaRosa take the chance that a second jury would award greater punitive damages, but that its award would be reduced again by the Iowa supreme court on a second fact-finding review. Patently, Ezzone and LaRosa could not take that chance because if there was any consistency of review to be anticipated, they logically were entitled to anticipate that the Iowa supreme court would fact find the same way twice on the same evidence. (*See*, app. pp. 113-114, 118-119.)

The Iowa supreme court further impeded any chance of subsequent judicial review by refusing to clarify what provocation really meant or whether it was even a factor upon which the jury had to be instructed, (as compared to an appellate factor only). (app, pp. 40, 48-49, 54, 64-68, 81-82, 90, 105-110.) In this regard, Ezzone and LaRosa

both denoted to the Iowa supreme court that there was no evidence that they had participated "in the conduct complained of . . . " or otherwise provoked the Hansens into victimizing them. (app., pp. 60-61, 107-108.) They further denoted that the supreme court itself had not identified any such evidence in its opinion. (*Id.*) Therefore, it was an enigma to them as to how or whether, without committing error, the trial judge could or should tailor these critical provocation instructions to the evidence if they chose a new trial. (*See,* app. p. 108.) Similarly, they were at a loss even to know what evidence would be relevant to the seemingly-critical provocation issue. (*Id.*)

Finally and perhaps most significantly, the Iowa supreme court denied a motion by Ezzone and LaRosa which would have allowed it to resume a common law review role. (app. pp. 70-83.) By that motion, they requested that in light of the new review factors announced, including provocation, the reduction question should be remanded to the trial court to make the initial application of these factors to the evidence. (app. pp. 71-78.) Under prior Iowa law, this review was a quasi-fact, light-most-favorable, discretionary review by the judge who was in the recognized superior position of actually having observed the witnesses testify. (app. pp. 72-76.) If such a remand had been ordered, then the Iowa supreme court could have reviewed for abuse of discretion in the light most favorable, rather than fact find *de novo.* (app. pp. 76-78.)

In sum then, the action of the Iowa supreme court in this case has as effectively removed judicial review in Iowa of punitive damages fact-finding as to amount, as did the 1910 amendment to the Oregon constitution. *Oberg, supra,* 114 S.Ct., at 2338-2348. Both removals, of course, were effectuated by "abrogation of a well-established common law protection . . . without providing any substitute procedure . . . " *Id.*, 114 S.Ct., at 2339, 2341. The only difference was that instead of leaving the

jury unfettered as to amount, the Iowa supreme court invested itself with unfettered super-jury powers, thereby leaving unreviewable its verdicts as to appropriate amounts to punish and deter.

D. Arbitrariness Resulting From Unreviewable Fact-Findings. As this Court recognized in *Haslip, supra,* 111 S. Ct., at 1043, "unlimited judicial discretion . . . may invite extreme results that jar one's constitutional sensibilities." In this case, Ezzone and LaRosa believe that the 80%-99% fact-finding reductions by the Iowa supreme court are not only "extreme" and "jarring", but also the direct result of a fact-finder knowing that it could be arbitrary because its decision was not subject to review.

Given the dearth of expressed rationale in its opinion, it would be speculative to say why the Iowa supreme court had the extreme "subjective reaction" it did to the jury's punitive damages verdicts. Yet, it still is well to note that the dearth itself raises a fair presumption of arbitrariness. That is, when a court cannot or will not explain its reasoning process, a logical inference is that there are significant defects in that process that it does not want to disclose.

There is no known precedent in Iowa for ordering a remittitur anything even close to 90%. (app. pp. 98-101.) There also is no known precedent in Iowa for declaring punitive damages which are merely double the size of the approved compensatory damages to be excessive. (app. pp. 101-102.) There further is no known precedent in Iowa for determining punitive damages of approximately 10% of the wrongdoers' net worth to be excessive. (app. pp. 103-104.) This lack of analogous precedent also raises a fair presumption of arbitrariness.

The lack of *stare decisis* framework surrounding the punitive damage decision in this case virtually demands a deduction that the extreme 90% reduction, (99% in the case of the bank), was attributable to the new, amorphous factor of provocation. Assuming this to be true, the

reduction must be viewed as grossly and plainly arbitrary. It also must be viewed as "wholly disproportioned to the offense . . . " *TXO, supra,* at 2731.

Apart from the striking irrationality of basing a 80%-99% reduction of a wrongdoers's punishment on the perceived quality of the victim or his or her conduct, there simply was no evidence that either Ezzone or LaRosa had provoked the Hansens. They did not participate in the intentional torts against themselves. They did not do anything to encourage the Hansens to victimize them.

In this regard, the easier case to examine is LaRosa's. She briefly met Willis Hansen when he visited the Florida business two days in 2/86. At that time, Riccardi gave Mr. Hansen some financial information about the Ezzones' finances, but both she and the man who accompanied Mr. Hansen to Florida testified that LaRosa gave no information, financial or otherwise. Contrary to the Iowa supreme court's finding, there also was no evidence that at that time, LaRosa "backed Ezzone's misrepresentations about the business to the Hansen defendants, [whatever those unrevealed 'misrepresentations' were thought to be]." (app. p. 24.) Moreover, Willis Hansen testified that his bank made its loan commitment primarily on what he observed of the manufacturing process, all of which he admitted was just as it appeared.

The second and final occasion LaRosa had any business contact with any of the Hansens was on 3/14/86. Neither she, nor Ezzone made any representations about the business on that occasion. Instead, Willis Hansen guided them through the signing of the corporate and loan documents designed to protect his bank. LaRosa left Iowa shortly thereafter.

LaRosa did return to Iowa for about a month in 8/86-9/86. However, there was no evidence that she even had any business contact with any of the Hansens during this period, let alone "backed" any "misrepresentations"

by Ezzone. She did not return to Iowa after 9/86, until the 1992 trial.

As a corollary, the only germane information the Hansens had about LaRosa was the information gained on 3/14/86 that she was the equal owner of the business and the information gained in the fall, 1986, that Riccardi was manipulating Ezzone into trying to hide from LaRosa the business' ongoing existence in the Florida divorce. Yet, despite knowing that she was a rightful owner of the business, (the only information given by LaRosa to them), the Hansens assisted Riccardi in many ways to hide the business, to drain the considerable funds of the business, and ultimately to buy the business from Riccardi alone. Furthermore, even if the missing evidence were assumed that Ezzone or LaRosa had misrepresented the business to the Hansens in Florida, the Hansens still were crafty enough to procure full payment of their loans in the process of assisting Riccardi in his grand breach of the confidential relationships with LaRosa and Ezzone.

Thus, in the context of the evidentiary record, there simply were no extant "provocation" grounds for reducing the amounts meted out by the jury to punish the Hansens for their intentional and outrageous misconduct to LaRosa. Unless somehow being driven out of Iowa by Riccardi and consequently making herself more vulnerable as a victim constituted provocation, LaRosa just did not do anything to cause the Hansens to commit the intentional torts against her and certainly did not participate in them.

Additionally, given the net worths involved, an $874,900 penalty to punish and deter the Hansens for and from this outrageous victimization was, in and of itself, hardly excessive; whereas, the $97,000 cost-of-doing-business assessment was practically no penalty or deterrent at all to millionaires. Further heightening this

caprice, the Iowa supreme court left it a complete mystery as to why the State Bank of Lawler, found to have committed the exact *same* intentional torts as the other two Hansens, had the punitive damages against it reduced to a nominal $1,000. (app. p. 24.)

The same analysis of Ezzone's alleged acts of provocation is equally applicable, although more difficult to describe. It is more difficult to describe because the Iowa supreme court did not identify any act he supposedly did to provoke the Hansens. (app. pp. 23-24.)

Identification or not, however, the point remains. Except for an unsupported and vague reference to a "backing of misrepresentations", the Iowa supreme court did not point to a single piece of evidence and did not disclose a single thread of logic to justify its fact-findings over the jury's. (app. pp. 23-24.) Instead, caught up in its own "subjective reaction", the Iowa supreme court revealed arbitrariness and irrationality via minuscule punitive damages which were plainly and oppressively out of proportion to the immensity of the torts committed. In short, for no good reason, it allowed the reasonableness of the jurors to be replaced by the fickleness of judges, encased in a cold record.

E. Due Process Applies Equally to All Judicial Reviews of Punitive Damages Amounts. Without question, the posture of this case is not the same as those punitive damages cases which have preceded it in this Court. The preceding cases clearly were concerned with arbitrarily-excessive punitive damages by fact finders. This case is concerned with arbitrarily-inadequate punitive damages by fact finders. Even so, the baseline principles appertain.

One of those principles was quoted earlier as follows: "The fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property." *TXO*, 113 S.Ct., at 2731. This Court has decided in *Oberg* that judicial review of punitive damage fact determinations is one of the ways of implementing

that "fundamental guarantee". Concededly, it has so decided because of the danger that through government-sanctioned punitive damages determinations, persons will be deprived arbitrarily of property to pay judgments for the same. Still, the same rationale applies to government-sanctioned determinations which arbitrarily deprive persons, such as Ezzone and LaRosa, *as well as the rest of society which they represent*, of property in the form of punitive damages judgments. *See, Shepherd Components, Inc. v. Brices Petrides-Donahue & Associates, Inc.*, 473 N.W.2d 612, 619 (Iowa 1991), (no vested rights to punitive damages *prior* to judgment); *Shaw v. Addison*, 18 N.W.2d 796, 800-801 (Iowa 1945), (judgment is final adjudication, subject only to divesting on appeal); Rule 7, I.R.A.P., ("No appeal shall vacate or affect the judgment appealed from . . . ").

The system of appeal adopted by the Iowa supreme court in this case has eliminated judicial review of the dispositive fact-finding of the punitive damages amount. It also has abrogated the common law review of the formerly-dispositive fact-finding of the punitive damages amount. In theory, there is nothing to prevent the Iowa supreme court from fact finding an arbitrarily-excessive and unreviewable amount through the device of additur. Consequently, assuming such an additur would be constitutionally infirm under *Oberg*, then out of fundamental fairness, so should the device of remittitur be, (at least as employed by the Iowa supreme court).

Indirectly then, this case "pose[s] the more difficult question of what standard of review is constitutionally required. . . . " a question not previously faced by this Court. *Oberg, supra*, S.Ct., at 2341, fn. 10. Differing from what might have been anticipated as the test case for that question, this case has the merit, nevertheless, of posing it in a larger arena. That is, given that judicial review of the punitive damages amounts found now is required under *Oberg*, it asks: What standard is "fundamentally

fair" to all parties, not just defendants, but also plaintiffs and the public they represent, (including potential future victims of the defendants and others inclined to commit similar intentional torts); and what review is necessary to prevent an arbitrary amount being fixed, high or low?

II. BY RAISING THE PUNITIVE DAMAGE REDUCTION ISSUE *SUA SPONTE*, AND RESOLVING IT *EX PARTE*, THE IOWA SUPREME COURT DENIED PETITIONERS DUE PROCESS NOTICE AND AN OPPORTUNITY TO BE HEARD.

In a notable decision by this Court, Justice Frankfurter described due process as follows:

> The requirement of "due process" is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble . . . Expressing as it does in its ultimate analysis *respect enforced by the law for that feeling of just treatment* which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. *Representing a profound attitude of fairness between man and man, and* more particularly *between the individual and government*, "due process" is compounded of history, past courses of decisions, and stout confidence on the strength of the democratic faith which we must profess. . . .
>
> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; *a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.*
>
> Man being what he is cannot safely be trusted with complete immunity from outward

> responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest to its reliability. The validity and moral authority of a conscience largely depend on the mode by which it was reached. *Secrecy is not congenial to truth-seeking* and self-righteousness gives too slender an assurance of rightness. *No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done. Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 162-163, 170, 171-172, 71 S.Ct. 643-644, 647-649, 95 L.Ed. 817, ___ (1951), (*emph. supp.*).

In the "ultimate analysis" of this case, Ezzone and LaRosa distinctly do not have "that feeling of just treatment" or that "feeling . . . that justice has been done" or that "fairness" has been "practiced" by the Iowa supreme court. They were not on notice at any time *before* the Iowa supreme court issued its property-depriving decision on 9/21/94 that the amount of their punitive damages judgment, as excessive, was at issue or that a new fact-finding as to amount could or would be made, especially on factors other than those considered by the jury and the trial judge, (or even known to practitioners from precedent). *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971), ("the root requirement . . . [is] that an individual be given an opportunity for hearing *before* he is deprived of any significant property interest.").

Without such notice, Ezzone and LaRosa also certainly did not have the opportunity to "meet" these issues. Moreover, even though the Iowa appellate rules

afforded the possibility of a post-deprivation rehearing, Rule 27, I.R.A.P., the Iowa supreme court denied them that opportunity. Further, even if rehearing had been granted, the Iowa supreme court was so vague in its reasons for reduction, particularly in its concepts of what constituted "participation in the conduct complained of" or other forms of provocation, Ezzone and LaRosa would not have had adequate notice in any case of the issue or issues that this court "secretly" decided justified a 90% reduction overall in verdicts applauded by the trial judge.

These are troubled times for a tort system under severe attack. These are not "fair weather" times for the justice wrought on behalf of society by jury-fixed punitive damages. Still and all, when a government institution shows so little "respect" for the sanctity of the jury fact-finding process, the orderly process of error preservation and assignment, and the process of deciding only those legal error issues brought to it within the law of the case framed by the parties, (or at least affording notice and an opportunity to be heard on any new issues), then it denies the very due process which engenders "respect" for the institution itself. Certiorari therefore, should be granted in an effort to restore the "profound attitude of fairness . . . between the individual and government"

which should exist both in Iowa and throughout this nation.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

No. 273 / 93-855

Filed September 21, 1994

M. HAROLD EZZONE,

Appellant,

PATRICIA L. LaROSA,

Intervenor-Appellant,

vs.

RONALD RICCARDI a/k/a "RICK" RICCARDI, WILLIS M. HANSEN, DENNIS B. HANSEN, PRECISION OF NEW HAMPTON, INC., and STATE BANK OF LAWLER,

Appellees.

PATRICIA LaROSA,

Appellant,

vs.

RONALD RICCARDI a/k/a "RICK" RICCARDI, WILLIS M. HANSEN, DENNIS B. HANSEN, PRECISION OF NEW HAMPTON, INC., and STATE BANK OF LAWLER,

Appellees.

Appeal from the Iowa District Court for Chickasaw County, James C. Bauch, Judge.

Appeals and cross-appeals following jury verdicts in tort suit arising from acts in connection with commercial transactions. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

Mark S. Soldat, Algona, and Mary Jane White, Waukon, for appellant M. Harold Ezzone.

Donald G. Thompson, Melissa Weets Anderson, and David E. Mullin of Bradley & Riley, P.C., Cedar Rapids, for appellant Patricia L. LaRosa.

Andrew F. Van Der Maaten of Anderson, Wilmarth & Van Der Maaten, Decorah, and Mark McCormick and Margaret C. Callahan of Belin Harris Lamson McCormick, P.C., Des Moines, for appellees.

Considered by McGiverin, C.J., and Harris, Lavorato, Neuman, and Ternus, JJ.

HARRIS, Justice.

Appeals are routinely controlled by our scope of review. This case, involving a surprising jury verdict, is a classic example. Plaintiffs, formerly husband and wife, recovered substantial verdicts following a disastrous manufacturing venture. Defendants, who consider themselves to be innocent financial backers, are convinced plaintiffs' financial wounds were either self-inflicted or caused by the employee they themselves selected. This employee, a defendant who did not attend trial, is severely chastised by all parties for his duplicity in the events leading to this dispute. The present suit[1] is largely a contest to determine who should bear the burden of loss for his misdeeds. Defendants' view, even though

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[1] We had a preliminary view of this dispute. In *Ezzone v. Hansen*, 474 N.W.2d 548 (Iowa 1991), we held that Ezzone was not judicially estopped from proceeding with this suit by reason of his testifying, in a Florida divorce case, that he had no interest in the business.

supported by considerable evidence, was rejected by the jury.

The jury subscribed to plaintiffs' factual contentions, contentions that clearly would have been rejected by many fact finders. Because we cannot say there is no substantial evidence supporting plaintiffs' claims, and because the case was submitted on instructions without objections by defendants' trial counsel, we affirm the findings of liability and compensatory damages. In accordance with a rule now mandated by the United States Supreme Court, we review and reduce the punitive damage awards.

Harold Ezzone and his wife Patricia LaRosa, the plaintiffs, equally owned and operated an automotive parts remanufacturing business called Precision Torque Converters of Florida, Inc. (PTCF). Ezzone founded the company based on his self-acquired knowledge of torque converter repair and his perceived demand for those services. Ezzone was gifted mechanically, but his speech impairment and cystic fibrosis are said to have hindered PTCF's expansion.

In 1983 the plaintiffs met defendant Ronald "Rick" Riccardi. Riccardi encouraged the plaintiffs to expand the business and soon thereafter assumed control of financial affairs of the company. Under his direction the business expanded, ultimately employing fifty people and operating three shifts. By now Riccardi had taken over all facets of the business and was commanding sizable compensation. Riccardi did not, however, become an owner, director, or officer, and was never given authority to sign checks.

In 1985 Riccardi and Ezzone began exploring the possibility of opening a new factory in the west or north. Defendants point out that this was because the Florida operation was floundering. Although not readily apparent at this time, the business mortgage payments from PTCF were delinquent, and the mortgage was later foreclosed. The plaintiffs provided a signed personal financial statement showing net worth of $1,479,463, but their business bank account showed an overdraft balance of $57,181. An independent audit showed a pretax income from the company of $290,000. Defendants now assert the company actually lost $8000 that year.

During 1985 Riccardi communicated with the Iowa development commission and later decided to locate in New Hampton. Because Riccardi was slow to provide detailed information, the commission delayed acting in the matter. In January of 1986, Riccardi met with New Hampton officials, including banker Robert Rigler, to whom Riccardi provided financial information. A three-bank consortium, including Rigler's, and defendant Willis Hansen's bank, State Bank of Lawler (cumulatively "Hansen defendants" and including defendants Dennis Hansen and Precision of New Hampton, Inc.), was to provide financial incentives if the information that had been provided proved to be accurate.

Rigler ultimately withdrew from the arrangement. He discerned problems with the financial information, and feared the New Hampton community would ultimately suffer from the venture. After Rigler withdrew, Willis visited the PTCF factory in Florida. He met with the plaintiffs and became encouraged to help them in Iowa. Willis and the defendant Bank of Lawler ultimately

provided a $300,000 loan commitment to start the Iowa operation. The plaintiffs did not contribute any personal assets to the start-up, but all remaining inventory and equipment of PTCF was transferred to the Iowa factory.

Precision Torque Converters of Iowa (PTCI) was incorporated, and shares were equally distributed to LaRosa and Ezzone. All actions of the corporation required the consent of both parties. LaRosa was to return to Florida and manage PTCF, while Ezzone remained in Iowa to operate PTCI.

Upon LaRosa's return to Florida, she was beset with major financial difficulties at the company. The plaintiffs now blame this collapse on Riccardi. At the time, though, Riccardi ascribed the problems to LaRosa and convinced Ezzone to also blame her for them. PTCF was ultimately abandoned and LaRosa briefly came to Iowa. Riccardi and Ezzone promptly left on a business trip to Taiwan, leaving LaRosa alone in Iowa.

LaRosa then had to return to Florida because of arrest warrants issued for her after she signed several insufficient funds checks for PTCF. Riccardi told Ezzone that LaRosa had been unfaithful to him while in Florida. According to the plaintiffs, Riccardi then convinced Ezzone to begin hiding assets of the company and switching ownership status.

Ezzone filed for divorce in Florida and started divesting LaRosa of marital property. In this quest, Ezzone asked his attorney, Michael Kennedy, to remove LaRosa as a PTCI shareholder. Kennedy agreed to do so but did not follow through. All of these actions were said to be under the influence of Riccardi.

While Riccardi and Willis were vacationing in Florida, the PTCI factory burned to the ground. Insurance proceeds of $950,834 were paid into accounts at the bank. Although the ultimate destination of these moneys is in dispute, the factory was rebuilt.

Willis and defendant Dennis Hansen finally purchased PTCI for $250,000. The company was reincorporated as Precision of New Hampton, Inc. and, as mentioned, is one of the defendants in this suit. Although plaintiffs were not present at the closing, the Hansens accepted Riccardi's authority to transfer the property and paid the purchase price to him. Riccardi never transferred these moneys to the plaintiffs.

Ezzone initially brought suit against Riccardi, seeking an accounting. After further investigation, Ezzone added the Hansens and the bank as defendants. LaRosa later intervened.

The case was submitted on special verdicts. The jury found that Ezzone and LaRosa each owned fifty percent of PTCI and were entitled to recover on various claims we shall discuss. Damages were awarded against the defendants as follows:

> 1. $200,000 each to Ezzone and LaRosa against all defendants on interference with contract claims (the parties agreed that this claim is duplicative of item 3, the confidential relationship claim);
>
> 2. $125,000 each to Ezzone and LaRosa against Riccardi for his conversion of ownership (all defendants were found to have acted in concert with Riccardi) (the parties agreed that

this claim is duplicative of item 3, the confidential relationship claim);

3. $325,000 for Ezzone and $350,000 for LaRosa against Riccardi for breached confidential relationship (all defendants were found to have acted in concert with Riccardi) (all parties agreed that this claim was duplicative of the conversion and interference damages, so judgment was only entered on this jury award);

4. $180,000 for Ezzone in punitive damages against Willis Hansen;

5. $25,672 for Ezzone in punitive damages against Dennis Hansen;

6. $180,000 for Ezzone in punitive damages against the State Bank of Lawler;

7. $450,000 for LaRosa in punitive damages against Willis Hansen;

8. $59,000 for LaRosa in punitive damages against Dennis Hansen;

9. $365,000 for LaRosa in punitive damages against the State Bank of Lawler.

Ezzone and LaRosa appeal from certain findings, and the Hansen defendants cross-appeal. As mentioned, Riccardi did not appear at trial; he is not involved in this appeal.

The action was tried to a jury at law, so our review is on error. Iowa R. App. P. 4. In considering the sufficiency of the evidence of a defendant's negligence, we view the evidence in the light most favorable to the plaintiff. *Miller v. Young*, 168 N.W.2d 45, 50-51 (Iowa 1969). It would be unduly cumbersome to consider the contentions in the

sequence presented in the briefs, so we address them in the order we deem of controlling importance. Divisions I through X relate to issues the Hansen defendants raise in their cross-appeal. Divisions XI through XIV relate to issues raised by plaintiffs in their appeals. Other divisions relate to issues that will be explained.

I. The Hansen defendants challenge the jury's verdicts on plaintiffs' intentional interference claim on four grounds. They first assert there was insufficient evidence to support submission of the claim to the jury. It was submitted on the theory that the shares Ezzone and LaRosa held in PTCI constituted contracts and that defendants interfered with these contractual rights. The theory requires that:

> One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing [the] performance to be *more expensive or burdensome,* is subject to liability to the other for the pecuniary loss resulting to [the other].

Restatement (Second) of Torts § 766A (1979) (emphasis added); *Nesler v. Fisher & Co., Inc.*, 452 N.W.2d 191, 194 (Iowa 1990). Defendants argue that no evidence existed from which a jury could find that performance was made *more expensive or burdensome* to Ezzone or LaRosa. This tort was presented to the jury as follows:

> Ronald Riccardi, Willis M. Hansen, Dennis B. Hansen, the State Bank of Lawler and/or Precision of New Hampton, Inc. intentionally and

> improperly interfered with the contract by treating Ronald Riccardi as the only shareholder, director and officer of Precision Torque Converters of Iowa, Inc.

The defendants' trial counsel (they retained a different counsel on appeal) did not object to submission of this instruction. It therefore became the law of the case. *Tarrell v. Erdmann*, 221 N.W.2d 504, 507 (Iowa 1974). Hence we are bound by the instruction and not prior case law in our analysis. The question thus becomes whether sufficient evidence supported the jury's finding that defendants intentionally and improperly interfered with Ezzone's and LaRosa's contracts as shareholders in PTCI, without requiring a showing of more expense or burden.

Ezzone asserted the Hansen defendants interfered with his stockholding contract by dealing with Riccardi as if he were the only shareholder, director and officer of the corporation. He claims this interference prevented him from exercising his rights and powers under the contract.

Viewing the record in a light most favorable to Ezzone, it can be said the Lawler bank and the Hansen defendants relinquished complete control of all PTCI funds within their possession to Riccardi personally. This occurred in April 1987 when they created a $100,000 certificate of deposit in Riccardi's name and wired $150,000 in PTCI investment account and sale proceeds to Riccardi in Florida. In June of 1987, the bank unilaterally closed all PTCI accounts, despite Ezzone's protest, and gave remaining account funds to Riccardi. Evidence also showed that the bank gave Riccardi access to the PTCI

investment account, which neither Ezzone nor LaRosa had authorized.

According to defendants' evidence, of course, all this was allowed to happen because the bank was lead to believe Riccardi was given Ezzone's and LaRosa's consent to control the business. But, according to plaintiffs' evidence, it happened because the bank was operating in concert with Riccardi to remove Ezzone and LaRosa from the operational picture. The bank's alleged motive was the purchase of PTCI at a discount price. While strong evidence clearly supported the first picture, sufficient evidence also supported the latter, more sinister view. Willis worked very closely with Riccardi throughout 1985 and 1986 and should have learned the nature of Riccardi's interest. The record supports a conclusion that he knew Ezzone and LaRosa were the sole owners of PTCI and that he knew Riccardi had no actual authorization to handle money personally or to sell PTCI's assets. Willis should have known better than to purchase PTCI's assets solely on the basis of Riccardi's authority.

We conclude that sufficient evidence supported the jury's finding that the bank and associated defendants interfered with Ezzone's rights as a shareholder in PTCI.

The defendants add a special abandonment argument against LaRosa. In addition to arguments made against Ezzone's claims, they contend LaRosa abandoned PTCI after attending and participating in the 1986 closing. After that point, they say, she took no action with respect to her ownership interest.

We however find this argument unpersuasive. LaRosa was made a fifty percent shareholder of PTCI

upon its incorporation. She contends her ownership never ended, that she never sold, transferred her shares, or relinquished them in any way. Defendants note that she failed to list her stock as an asset in her divorce from Ezzone. Even given this apparent admission, the jury could have viewed this as an oversight and decided she retained ownership. The answer to the special argument against LaRosa is that mere inaction, when no action is called for, does not equal abandonment. There is sufficient record to support the jury's verdict with respect to LaRosa's claim.

II. Ezzone and LaRosa sought damages for the decline in value of their PTCI shares caused by defendants' acts. Defendants argue that this claim was available only to PTCI, not its shareholders.

"As a general rule, wrongs which affect the corporation itself, or the stockholders generally, give rise to causes of action on the part of the corporation, and not primarily on the part of an individual shareholder." 19 Am. Jur. 2d *Corporations* § 2246, at 148 (1986). Further, it has been noted that:

> The fact that a stockholder suffers indirect harm, such as a diminution in the value of corporate shares resulting from the impairment of corporate assets, due to a wrong done the corporation by a third party, does not give the stockholder an individual right of action since such an action would authorize multitudinous litigation and ignore the corporate entity.

Id. at 149.[2]

Plaintiffs argue that theirs is a direct, not a derivative, action against the defendants. A stockholder may sue when he or she has sustained a loss *separate and distinct* from that of other stockholders generally. *Id.* § 2245, at 147.

> A stockholder may sue as an individual where the act complained of creates not only a cause of action in favor of the corporation but also creates a cause of action in favor of the stockholder as an individual, such as where the act is in violation of duties arising from contract or otherwise. . . .

13A William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 5921, at 519 (rev. ed. 1954); *see*

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[2] We pass considering an exception to this general rule. It arises when corporations are closely held by a small number of individuals and operated more as a partnership than a corporation. It my then be proper to bring an action in the names of individual owners, though technically the cause of action may rest with the corporation.

Derivative suits on behalf of Iowa corporations are governed by Iowa Code § 490.740 (1993). Under that provision, certain procedures must first be followed before a shareholder is allowed to bring suit for a wrong done the corporation. Among other things, the shareholders must first demand that the corporation take action. Such demands must be supported with appropriate affidavits. Iowa R. Civ. P. 44. In this case, however, the demand would be made by the shareholders to themselves, as they were also the officers of the corporation. We have held that, when such demands are futile, the shareholder need not make them. *Holi-Rest, Inc. v. Treloar*, 217 N.W.2d 517, 523 (Iowa 1974). Here, the requests might well have been unnecessary.

Cunningham v. Kartridge Pak Co., 332 N.W.2d 881, 883 (Iowa 1983). Such an injury must be separate and distinct to the suing shareholder and not generally injuring all shareholders. *Id.*

Alternatively, when there exists a special duty to the shareholder, outside of duties to the corporation, breach of that duty individually harms the shareholder and suit may be brought in that capacity. *Id.* To this end, plaintiffs argue the interference with contract was specifically directed at them, not the corporation. Because of this, they claim to possess their own action.

We agree. The defendants are said to have specifically directed their efforts at Ezzone and LaRosa in an attempt to separate them from their ownership interests in the corporation. We think a personal right of action is alleged.

Plaintiffs right is even more strongly supported on an alternative ground. They note that PTCI ceased to exist in November 1987 when Iowa's secretary of state terminated the corporation pursuant to Iowa Code section 496A.130 (1987) (now Iowa Code section 490.1420 (1993)). Plaintiffs argue they possess any right of action previously held by the corporation.

The cancellation of a corporation does not destroy remedies available to the corporation. Iowa Code § 496A.130 (1987) (fifth unnumbered paragraph). (Since repealed *See* Iowa Code § 490.1405(2)(e) (1993).) Upon issuance of the certificate of cancellation, the entity was to be liquidated as provided by chapter 496A for dissolutions generally. Under these liquidation provisions, the shareholders had the "power to take such corporate or

other action as shall be appropriate to protect such remedy, right or claim." Iowa Code § 496A.102 (1983) (*see now* Iowa Code §§ 490.1406 and .1407 (1993)). Most importantly, under no circumstances could a canceled corporation prosecute an action is its own name prior to reinstatement. Under former chapter 496A, therefore, the shareholders of a canceled corporation were empowered to bring suit on the entity's behalf, but in their name individually, while the corporation was stripped of that right.

III. The jury awarded Ezzone and LaRosa $200,000 each against the defendants on the interference claim. Defendants argue insufficient evidence supported this amount. They argue the most diverted by Riccardi was $250,000 and that the maximum per share recovery is $125,000.

Plaintiffs however note that an additional $500,000 was drained from PTCI bank accounts after January of 1987. We agree that the jury could have concluded that this money was siphoned off wrongfully and added some or all of it to damages. The plaintiffs were also entitled to recover this fund on the canceled corporation theory.

IV. Defendants argue that acts of other parties (specifically Riccardi) were the intervening causes of any of plaintiffs' damages or injuries. The trial court's refusal to instruct on this defense is the subject of another assignment. This defense provides that, when an intervening act of a third person is intentionally tortious, or criminal, and when the harm is not within the scope of the risk

created by the actor's conduct, responsibility for the consequences of that act may be shifted to that third person. Restatement (Second) of Torts § 442B, at 469 (1965).

We find no error in the refusal to give the requested instruction. "[R]ules that restrict the actor's responsibility under theories of superseding cause are for the court to apply rather than the jury." *State v. Murray*, 512 N.W.2d 547, 550 (Iowa 1994) (citing Restatement (Second) of Torts § 453). We do not suggest that the superseding cause doctrine is appropriate here in any event. We have grave doubts whether an *intentional* tort can be superseded by another intentional tort, and we do not decide whether Riccardi's acts were without the scope of the risk created by the other defendants.

V. Defendants argue the district court erred in overruling their objection to instruction 21 which defines the nature of the plaintiffs' contract with the corporation, or the rights they held as shareholders.[3] Defendants objected on the ground that the instruction failed to say that

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[3] Instruction 21 reads as follows:

A contract exists between a corporation and its shareholders. Under this contract, the shareholders have the right to choose the corporation's board of directors.

All corporate powers are exercised by or under the authority of, and the business and affairs of a corporation are managed under the direction of, the corporation's board of directors. These powers include the powers to:

(a) make and alter bylaws;
(b) issues the shares stated in the corporation's articles of incorporation;
(c) purchase, take, receive, leave, or otherwise deal in and with, real or personal property, or any interest therein, wherever situated;
(d) to sell, convey, mortgage, pledge, lease, exchange

agents, as well as directors, could exercise corporate powers. This argument was apparently based on the defense theory that Riccardi was an agent of the plaintiffs and therefore acted under their authority. Because of this, his acts could not have been wrongful to them and, by implication, the defendants would not be acting in concert to a wrongful act.

Defendants concede that they withdrew their agency claim but insist they continued to assert Riccardi had actual or apparent authority to act for PTCI. We think that in giving up their agency defense defendants waived all its elements including the authority question. The assignment is without merit.

VI. Finally defendants attack the trial court's use of instruction 24, listing the factors to be considered in evaluating the reasonableness of the interfering conduct.[4]

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transfer, or otherwise dispose of all or any part of the corporation's property and assets;

(e) make contracts;

(f) elect or appoint officers and agents of the corporation, and define their duties and fix their compensation.

[4] Instruction 24 provided:

In determining whether a person's conduct in intentionally interfering with a contract is improper, you should determine whether the conduct was fair and reasonable under the circumstances. In determining whether the conduct was improper you may consider:

1. The nature of the conduct.
2. The person's motives.
3. The interests of the party with which the conduct interferes.
4. The interest sought to be advanced by the person.
5. The social interests in protecting the freedom of action

Defendants' challenge to this instruction, as we read it, contends that it is insufficient to include "all evidence on the issue of propriety of defendants' conduct." Because we do not read the instruction as so limiting, we find the assignment also without merit.

VII. Other assignments challenge submission of plaintiffs' conversion and confidential relationship claims. With regard to conversion, defendants argue that Riccardi's acts did not, as of the date specified by the jury, constitute conversion of plaintiffs' assets.

Conversion is the act of wrongful control or dominion over another's personal property in denial of or inconsistent with that person's possessory right to the property. *Kendall/Hunt Publishing Co. v. Rowe*, 424 N.W.2d 235, 247 (Iowa 1988); Restatement (Second) of Torts § 222A(1), at 431 (1965). The jury found by a special verdict that conversion by Riccardi occurred on January 30, 1987. Defendants note that, on that date, Riccardi endorsed a check and deposited it into a PTCI account. Because the money went to PTCI and not to Riccardi, defendants argue no conversion occurred.

But plaintiffs' property rights in PTCI consisted of their ownership and legal rights to possess, transfer or dispose of their interest in PTCI. *See State v. Cowen*, 231 Iowa 1117, 1123, 3 N.W.2d 176, 180 (1942). Their theory was that Riccardi, over time, gradually took bits and

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by the person and the contractual interests of the other party.

6. The nearness or remoteness of the person's conduct to the interference.
7. The relations between the parties.

pieces of corporate control away from the plaintiffs, but in fact was "setting them up" to convert all of their ownership interest to his control. We think a jury case on the conversion claim was presented.

The claim was presented by other evidence of false (and back-dated) organizational meeting minutes in which Riccardi purported to make himself sole shareholder, director and president of PTCI. Although it is claimed Ezzone was present at this meeting, he did not sign the minutes. The decision was made by the board of directors, but LaRosa, who was also on that board, did not attend the meeting.

At the sale of PTCI to Hansen, he accepted these organizational minutes as proof that Riccardi was sole owner and had authority to sell. He accepted them knowing Riccardi was in Florida on the date the papers were allegedly signed in New Hampton. Willis was present for the actual organizational meeting several months earlier in which Ezzone and LaRosa signed the minutes, but he was not troubled by the lack of their signatures on these minutes. Finally, he was presented with no transfer documents at all.

It was at this closing that Hansens paid $250,000 to PTCI in exchange for its assets. As mentioned, instead of depositing this amount in PTCI accounts, $150,000 was wired to Riccardi's personal account in Florida and a $100,000 certificate of deposit was created in Riccardi's name. None of these proceeds were ever advanced to the plaintiffs. This final sale was, under the plaintiffs' theory, the culmination of a lengthy process by which Riccardi gained control over the plaintiffs' interests.

Evidence tied the Hansen defendants to Riccardi's conduct. Plaintiffs point to Hansen's alleged elimination of two other consortium banks in the initial PTCI financing scheme. Similar "clearing of the field" occurred with respect to insurance providers. It is claimed that this caused forfeiture of certain state economic development grants. Plaintiffs also argue that the Hansen defendants' acts constituted criminal theft when they aided in Riccardi's scheme to convert ownership of PTCI. At the least, defendants were unable to convincingly explain their alleged ignorance of LaRosa's fifty percent ownership interest when they purchased PTCI's assets.

The jury could also have concluded from the record, depending on whom they deemed more credible, that Willis perjured himself on the stand. While Willis claimed no knowledge of any Riccardi "subterfuge" against LaRosa, attorney Michael Cross testified that Willis had told him the opposite. (Cross had been hired by Ezzone to investigate Riccardi's business dealings prior to this litigation.)

In defending against the confidential relationship claim, defendants focus on the wrongful behavior of the plaintiffs, especially that of Ezzone. Defendants note that the confidential relationship doctrine is based on the need for protection of an innocent, subservient person who relies in a transaction on the skill and integrity of the dominant person. *See Oehler v. Hoffman*, 253 Iowa 631, 635, 113 N.W.2d 254, 256 (1962); *Klatt v. Akers*, 232 Iowa 1312, 1319, 5 N.W.2d 605, 609 (1942). They argue, not without some evidence, that Riccardi's betrayal occurred in the course of a mutual, fraudulent scheme with Ezzone to cheat LaRosa. It is true that, for example, Ezzone lied

about his ownership interest in PTCI in divorce proceedings. He lied about ownership of other assets and sources of income as well.

The jury was entitled to accept Ezzone's explanation for his deceit. Under plaintiffs' theory, Riccardi manipulated Ezzone and LaRosa into a position in which severe marital stress occurred. His scheme required this goal was achieved when the Florida divorce court denied LaRosa any interest in PTCI. Under this theory, Riccardi's dominance over the affairs was only achieved through the trust given him by the plaintiffs. When he ultimately, under the plaintiffs' theory, used this trust to convert their assets, a breach occurred. The jury could have seen the evidence as supporting this theory. Again, the jury could also have found the Hansen defendants acted in concert in this breach of trust. The record supports the jury's finding of concert action.

VIII. Under plaintiffs' theory, Riccardi was the direct perpetrator of all torts alleged. The Hansen defendants became liable because they allegedly acted in concert with Riccardi to further his bad acts.

Under the Restatement, a person becomes subject to liability for harm caused by the tortious conduct of another when the person: (a) does a tortious act in concert with the other or pursuant to a common design with the other (traditional conspiracy); or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other in such conduct (aiding and abetting). Restatement (Second) of Torts § 876, at 315 (1979); *see Tubbs v. United Cent. Bank, N.A.*, 451 N.W.2d 177, 182 (Iowa 1990).

For conspiracy, an agreement must exist between the two persons to commit a wrong against another. The agreement must involve some mutual mental action coupled with an intent to commit the act that causes injury. *See Adam v. Mt. Pleasant Bank & Trust Co.*, 387 N.W.2d 771, 773 (Iowa 1986). Speculation, relationship, or association and companionship do not establish a conspiracy. *American Sec. Benevolent Ass'n, Inc. v. District Court*, 259 Iowa 983, 996, 147 N.W.2d 55, 63 (1966). As to aiding and abetting, there must be a wrong to the primary party, knowledge of the wrong on the part of the aider, and substantial assistance by the aider in the achievement of the primary violation. *Tubbs*, 451 N.W.2d at 182.

Defendants argue that plaintiffs' claim imposed a duty on them to monitor the internal affairs of PTCI, a duty they were not required to assume. They also argue there was no evidence of any conspiracy to divert corporate assets. We think the evidence, in the light most favorable to the plaintiffs, supports the finding of concert action by the Hansen defendants. Willis set up Riccardi's personal accounts, allegedly used to siphon off PTCI funds. Willis acknowledged Riccardi as PTCI president when he endorsed a $100,000 insurance check. Willis treated Riccardi as having authority to sell the corporation when he at least should have known there were problems with his asserted ownership. Willis acknowledged Riccardi's fraudulent ownership when he directed the sale proceeds to Riccardi's personal accounts. The jury could also have found Dennis acted in concert with Riccardi. Plaintiffs' evidence indicated Dennis Hansen aided Riccardi in the scheme to hide assets from LaRosa.

We think the jury's finding of concert is supported by sufficient evidence.

IX. Punitive damages can be awarded if the jury finds "the conduct . . . from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1(1)(a). The intentional acts of the defendant must be of "an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. . . . " *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 919 (Iowa 1990). The Hansen defendants contend that such a finding is unsupported by the record. They specially note Ezzone's own bad acts in hiding assets from LaRosa and argue this should counter any alleged bad acts of their own.

In common with most jurisdictions, we have considerable case law carefully explaining the nature and purpose of punitive damages. *See, e.g., Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247, 255-56 (Iowa 1993); *Ryan v. Arneson*, 422 N.W.2d 491, 495-96 (Iowa 1988). The cases make it clear that punitive damages are awarded, not because a plaintiff deserves them, but as punishment, to deter the defendant and others from repeating similar outrageous conduct. In the light of this purpose, and accepting, as we must, plaintiffs' version of the evidence, we cannot say an award of punitive damages was inappropriate.

Through recent years we have become increasingly willing to set aside a punitive damage award, finding the defendants' conduct insufficiently egregious to support it. *Coster v. Crookham*, 468 N.W.2d 802, 810-11 (1991). But

we have persisted, until now, in a resolute unwillingness to grant remittiturs in damage awards. *Team Cent., Inc. v. Teamco, Inc.*, 271 N.W.2d 914 (Iowa 1978).

We note, however, that we are now obliged as a matter of constitutional law to assume responsibility for reviewing the appropriateness of the size of punitive damage awards. Since our *Spaur* decision, the United States Supreme Court has decided it is a denial of due process for a state to allow punitive damages without according appellate review of the appropriateness of the amount. *Honda Motor Co. v. Oberg*, ___ U.S. ___, ___, 114 S. Ct. 2331, 2338-41, ___ L. Ed. 2d ___, ___ (1994). Although no constitutional question is presented here, we take the *Oberg* holding as a signal to order remittitur if appropriate.

This and future reviews will be conducted on the basis of principles previously announced in punitive damages cases. Awards will be tested with a view of the extent and nature of the outrageous conduct, the amount necessary for future deterrence, and with deference to the relationship between the punitive award and plaintiff's injury, as reflected in any award for compensatory damages. In addition to these traditionally factors, we shall consider all circumstances surrounding the conduct and relationship between the parties. Any provocation of the conduct by plaintiff will be a factor. *See* Restatement (Second) of Torts § 908 cmt. e (1979). We take the provocation to include participation in the conduct complained of.

Upon our mandated review, we consider the punitive award here to be greatly excessive. Although Ezzone convinced the jury he was manipulated by Riccardi into

undertaking his deceitful conduct, we think the record clear, for punitive damages purposes, that his participation was provoking as well as provoked. We think that punitive damages awarded him are out of proportion to any amount needed, in addition to compensatory awards, for deterrence purposes. Ezzone's punitive damage awards are reduced to the following amounts:

$18,000 against Willis Hansen
$2500 against Dennis Hansen
$1000 against the State Bank of Lawler

LaRosa's conduct was not subject to the same criticism as Ezzone's, but the record does clearly show she backed Ezzone's misrepresentations about the business to the Hansen defendants. In addition we think the punitive damages awarded to her, as was the case with Ezzone's, are out of proportion to any amount needed for deterrence purposes. LaRosa's punitive damages are reduced to the following amounts:

$90,000 against Willis Hansen
$6000 against Dennis Hansen
$1000 against the State Bank of Lawler

X. Turning to Ezzone's and LaRosa's appeals, they first complain of the trial court's refusal to allow adding LaRosa as a new plaintiff. Ezzone was first to sue and later moved for leave to amend and add LaRosa as a new plaintiff. The motion was denied. Because of this denial, LaRosa filed her own action against the defendants and petitioned to intervene in Ezzone's action. Her action was ultimately consolidated with Ezzone's for trial. Ezzone and LaRosa now seek reversal of the court's earlier denial. They seek this because LaRosa is said to have lost interest on her judgments. As now ordered, interest on

LaRosa's judgment runs from the time she filed her companion case. But if the trial court's denial were to be reversed, interest would run from Ezzone's filing, almost three years previously.

Rulings to amend are normally discretionary. *Atlantic Veneer Corp. v. Sears*, 232 N.W. 2d 499, 503 (Iowa 1975). But the trial court's ruling here was based on a misapprehension of the law. The trial court stated the motion was denied because "[Iowa rule of civil procedure] 88 and 89 are not intended for adding new plaintiffs." Iowa rule of civil procedure 89 authorizes amendments to add parties where the amendment relates back to the date of the original pleading. This rule speaks of amendments "changing the party against whom a claim is asserted. . . ." It is true that, on its face, this rule appears to involve only defendants. *M-Z Enters., Inc., v. Hawkeye-Security Ins. Co.*, 318 N.W.2d 408, 411 (Iowa 1982). We have held, however, that the rule also allows amendments that add plaintiffs. *Id.* The only requirement is that the named defendants have received sufficient notice of the action during the statute of limitations period. *Id.* Defendants do not assert any lack of notice.

Because the trial court's refusal to grant leave to amend was based on an erroneous legal assumption, it must be reversed. It does not however follow that leave should be granted. On remand the trial court should exercise its discretion on the motion. Only if it grants leave should it allow interest on the judgment as amended.[5]

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[5] If on remand the trial court denies LaRosa the right to be added as a plaintiff, an alternative interest argument must be

XI. Ezzone first filed his action against Riccardi on April 11, 1988, and sought monetary damages for wrongful conversion. This action was amended on April 22 to include the Hansen defendants and to seek declaratory judgment concerning ownership of PTCI. The amendment did not seek any monetary damages against the Hansen defendants. It was later, on march 17, 1989, that Ezzone moved for leave to amend so as to extend all monetary claims, previously asserted against Riccardi alone, to include the Hansen defendants. It was this amendment that alleged the concert of action claims. The motion was granted and the amended petition was filed on May 8, 1989.

The court awarded postcommencement interest on the $325,000 award for breach of confidential relationship from May 8, 1989, the date that claim was added to the suit. This award was pursuant to Iowa Code section 535.3 which allows interest to "accrue from the date of the commencement of the action." The action for monetary damages was thought to have been "commenced" when

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considered. LaRosa points out that we have held an intervenor does not need to abide by the statutes of limitations where the suit was filed within the applicable time period. *Kintzel v. Wheatland Mut. Ins. Assn*, 203 N.W.2d 799, 806-07 (Iowa 1973) (citing *Stevens v. Citizens Ins. Co.*, 69 Iowa 658, 664-65, 29 N.W. 769, 771-72 (1886)). LaRosa argues by analogy that her suit, as intervenor, relates back to the filing of Ezzone's suit and therefore interest should also accrue from that date.

We find that postcommencement interest is a far different matter from statutes of limitations, and reject the analogy as binding. If the order on remand is to grant the motion to add LaRosa as plaintiff, interest on her award will be allowed from the date of the filing of the motion.

that cause was added, not at the inception of the suit, so the trial court only awarded interest to that date.

When monetary damages arise from distinct new claims made in an amended petition, we allow interest on the judgment only from the date plaintiff filed its amended petition. *Beeck v. Aquaslide 'n' Dive Corp.*, 350 N.W.2d 149, 169 (Iowa 1984); *Coachmen Indus., Inc. v. Security Trust & Sav. Bank of Shenandoah*, 329 N.W.2d 648, 651 (Iowa 1983). *See also Happy Chef Systems, Inc. v. John Hancock Mut. Life Ins. Co.*, 933 F.2d 1433, 1437 (8th Cir. 1991) (citing the interpretation of *Beeck* and *Coachmen*). Although plaintiffs challenge our prior holdings, we believe they are correct and decline to overrule them.

We are satisfied that the claim for breach of confidential relationship first arose in the May 8, 1989 amendment. We affirm the trial court determination that interest accrued only from this date. The ruling applies as well to interest on LaRosa's $350,000 judgment.[6] We note we are unpersuaded by plaintiffs' contention that the beginning date should be May 1, 1989 (date of court approval), rather than May 8 (date of filing).

XII. All parties agreed that the $325,000 Ezzone verdict for breach of confidential relationship duplicated the $200,000 verdict for interference and the $125,000 verdict for conversion. But plaintiffs assert that some portion of

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[6] LaRosa was not a party to the action on May 8, 1989. The beginning date for accumulation of interest on her award will be affected by the trial court ruling on remand, previously mentioned, regarding the application that she be added as a party.

the $325,000 verdict was liquidated prior to the commencement of the action and therefore should include precommencement interest. The district court limited the recovery of postcommencement interest.

Iowa Code section 535.2(1)(b) allows interest to accrue on money after it becomes due. Section 535.2(1)(d) provides for interest on money "received to the use of another and retained beyond a reasonable time, without the owner's consent, express or implied." We subscribe to the general rule that interest runs from the time money becomes due and payable. *Vasquez v. LeMars Mut. Ins. Co.*, 477 N.W.2d 404, 406 (Iowa 1991). Interest generally will not run until the claim is liquidated, or is certain and known. *Id.* at 407. We recognize an exception "in cases in which the entire damage for which recovery is demanded was complete at a definite time before the action was begun." *Id.*[7]

Plaintiffs argue that the conversion claim became liquidated on January 30, 1987, the date the jury found Riccardi converted ownership and control to himself. Because the conversion claim was duplicated and subsumed in the breach of confidence recovery, the district court denied precommencement interest. We think the ruling was correct under our holding *Vasquez*, 477 N.W.2d at 407.

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[7] Of course this analysis does not apply in cases considering postcommencement interest. Iowa Code § 535.3 allows interest to accrue from date of filing regardless of whether it only became due at time of judgment. *Vasquez*, 477 N.W.2d at 406-07.

Ezzone looks back to alternative dates on which he can argue his damages were complete. This approach would allow precommencement interest in nearly every case on the basis of postverdict hindsight. The "entire damages complete" exception does not apply where there is a dispute concerning when the damages became complete. *See Mrowka v. Crouse Cartage Co.*, 296 N.W.2d 782, 784-85 (Iowa 1980). The trial court was correct in refusing to award precommencement interest.

XIII. After trial, plaintiffs requested certain costs be assessed to the defendants. They also asked that costs draw interest pursuant to Iowa Code section 535.3. The trial court awarded costs, but failed to mention interest. We have said that "money due on a judgment for costs is as much money due on a judgment as is money due on a judgment for damages, and this is true whether such costs embrace the fees of witnesses or officers or attorney's fees. *Arnold v. Arnold*, 258 Iowa 850, 856, 140 N.W.2d 874, 877-78 (1966). The trial court should have awarded interest.

The question remains as to when the interest should begin its accrual. Under Iowa Code section 535.3, interest accrues from the commencement of the action. We have held, however, that section 535.3 does not allow interest on expenses to accrue from commencement if the applicable transactions did not occur until after litigation had begun. *Rowen v. LeMars Mut. Ins. Co.*, 347 N.W.2d 630, 641 (Iowa 1984). Plaintiffs argue that interest should accrue on an individual expenditure basis, item by item. We reject this contention as wholly impractical. Such a rule would be impossible in its complexity. For costs accrued

after commencement of the action, interest is to be allowed only from judgment.

XIV. Issue is joined on the trial court's reduction of a *pro tanto* credit. Plaintiffs' damage awards were reduced by the amount they received in the settlement with attorney Michael Kennedy. There are two issues under this division. First, Ezzone and LaRosa claim that the Hansen defendants should have been denied this *pro tanto* credit because they failed to affirmatively plead and prove a right to it. Second, the Hansen defendants claim the award against Riccardi should not have been credited, and the credit should apply entirely to plaintiffs' recovery against them.

Under the *pro tanto* credit rule, we "allow a dollar-for-dollar credit against a plaintiff's personal injury verdict for sums received in settlement from other tortfeasors." *Knauss v. City of Des Moines*, 357 N.W.2d 573, 578 (Iowa 1984). "All payments in settlement of a claim, except payments in the nature of a gratuity or arising from separate contract, fall under this rule which is designed to prevent the unjust enrichment of a double recovery," *Id.* The burden is on the party seeking to reduce its liability by the settlement amount and must be pleaded as an affirmative defense. *Id.* This party must show that "without such a credit the plaintiff would receive more than full compensation for his [or her] injuries. . . . " *Id.*

The effect of our pro tanto credit rule has been circumscribed in comparative fault claims under Iowa Code sections 668.3 and 668.7. *Thomas v. Solberg*, 442 N.W.2d 73, 77 (Iowa 1989). This however is not such a case and the

traditional pro tanto credit rule applies. *See Freeman v. Ernst & Young*, 516 N.W.2d 835, 838-39 (Iowa 1994).

The plaintiffs note that, following Kennedy's settlement, the Hansen defendants never amended their answer to plead entitlement to the *pro tanto* credit. The Hansen defendants offered no evidence to support it. The trial court made no findings of fact on the issue, but did ultimately award the credit to all Hansen defendants and defendant Riccardi. So plaintiffs now urge that no *pro tanto* credit claim is presented.

Defendants requested the *pro tanto* credit, not in a regular pleading, but in a memorandum filed with the court. In responding, plaintiffs did not protest in any way that the memorandum was inadequate as a pleading, or that it failed to call for a hearing on the matter. Plaintiffs' resistance urged only that the *pro tanto* credit should not apply to the punitive damage awards. On appeal, though, plaintiffs attack the *pro tanto* credit on a much broader basis: the lack of a pleading, hearing and evidential showing of entitlement under *Knauss*.

Under ordinary circumstances plaintiffs' position would be sound. Parties urging an affirmative defense cannot rely on opposing parties to alert them of their burden to plead and prove it. But plaintiffs' resistance here was misleading; it urged a partial resistance in which they omitted the position they now urge. Under these special circumstances, we hold that defendants' memorandum asking for *pro tanto* credit was adequate for its application.

The plaintiffs next attack the application of the *pro tanto* credit to the punitive damage award. This issue was

preserved and appears to be a question of first impression in Iowa. Plaintiffs note the rationale for the *pro tanto* credit rule, which seeks to avoid compensation in excess of actual damage. Of course punitive damages have nothing to do with compensation. There is some force to this argument. We think that, normally, no one should be allowed to escape liability for punitive (as contrasted with compensatory) damages on the fortuitous basis of a *pro tanto* credit. But we need not decide the question here because at no time did the credit exceed the compensatory damages. This can be shown by referring to the following compilation of the district court in fixing the credits:

	Joint & Several Liability	Individual Share	Credit
Defendant			
Riccardi	$675,000	$145,000	$64,811.25
Willis H.	675,000	135,000	9,633.75
Dennis H.	675,000	135,000	2,791.25
Bank	675,000	135,000	8,566.25
Precision	675,000	135,000	1,697.50

Even if it applies as plaintiffs request, it leaves the ultimate award unaffected. There was no reversible error in awarding a *pro tanto* credit because of any effect on the punitive damage award.

XV. The district court entered judgment on the compensatory damages against all defendants jointly and severally. After subtracting the *pro tanto* credit, the court set out individual judgment amounts and did not clarify whether they would operate jointly and severally.

The jury awarded $325,000 and $350,000 in compensatory damages to Ezzone and LaRosa respectively. These were entered jointly and severally against all five defendants. In assigning the *pro tanto* credit, the court added these awards together, then divided that amount by five, arriving at $135,000 per defendant. The court then added the applicable punitive damage award, and any individual liability, to each share. From this, the court weighed each share and arrived at a percentage amount. Each defendant received this percentage share of the *pro tanto* credit created by the Kennedy settlement.

Confusion arose when the court entered judgment, but only stated the amount owed per litigant. This made it appear as if each defendant were individually liable, but not jointly and severally. Instead the court should have subtracted the overall *pro tanto* credit of $87,500 from the overall judgment of $675,000, leaving $587,500. This represents a 12.77¢ credit on each dollar of judgment.

Ezzone was awarded a $325,000 judgment against all defendants. The credit is 12.77¢ on the dollar, or $41,502.50. This leaves a joint and several judgment of $283,497.50. Ezzone was also awarded $5000 against Riccardi individually that should be credited $638.50, leaving a judgment of $4316.50.[8]

LaRosa was awarded a $350,000 judgment against all defendants. The credit is 12.77¢ on the dollar, or $44,695.

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[8] Defendants assert Riccardi was not entitled to any *pro tanto* credit. As can be seen in the above analysis, we disagree and have applied a share of the credit to him.

This leaves a judgment of $305,305. LaRosa was also awarded $5000 against Riccardi individually and should be credited $638.50, leaving a judgment of $4316.50.

Although the trial court factored punitive damages in assessing the *pro tanto* credit among the defendants, we have noted punitive damages are not allowed as compensation. We hold they should be omitted as a factor in allowing *pro tanto* credits.

Tax costs twenty-five percent to Ezzone, twenty-five percent to LaRosa, and fifty percent to the Hansen defendants. The case is remanded for entry of judgment in conformance with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

IN THE SUPREME COURT OF IOWA

S. Ct. No. 93-855

M. HAROLD EZZONE, and PATRICIA L. LAROSA,	Plaintiff-Appellant-Cross Appellee,
vs.	Intervenor-Appellant-Cross Appellee,
RONALD RICCARDI, a/k/a "RICK" RICCARDI, and	Defendant-Appellee,
WILLIS M. HANSEN, DENNIS B. HANSEN, PRECISION OF NEW HAMPTON, INC., and STATE BANK OF LAWLER,	Defendants-Appellees-Cross Appellants.
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PATRICIA L. LAROSA,	Plaintiff-Appellant-Cross Appellee,
vs.	
RONALD RICCARDI, a/k/a "RICK" RICCARDI, and	Defendant-Appellee,
WILLIS M. HANSEN, DENNIS B. HANSEN, PRECISION OF NEW HAMPTON, INC., and STATE BANK OF LAWLER,	Defendants-Appellees-Cross Appellants.

APPEAL FROM THE IOWA DISTRICT
COURT FOR CHICKASAW COUNTY
Hon. James C. Bauch, Judge

APPELLANT'S PETITION
FOR REHEARING

(Filed Oct. 07, 1994)

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SERVICE CERTIFICATE

The undersigned certifies that 18 copies of the foregoing Petition for Rehearing will be deposited in the U.S. Mail, postage prepaid, in an envelope addressed to the Clerk of the Supreme Court of Iowa, on the 4th day of October, 1994. The undersigned further certifies that 2 copies of the foregoing Petition for Rehearing will be deposited in the U.S. Mail, postage prepaid, in envelopes addressed to each of the following attorneys, Mr. Mark McCormick and Ms. Margaret C. Callahan, Belin, Harris, Lamson, McCormick, a Professional Corporation, 2000 Financial Center, Des Moines, Iowa 50309, Mr. Andrew F. Van Der Maaten, Anderson, Wilmarth & Van Der Maaten, P.O. Box 450, Decorah, Iowa 52101-0450, Mr. Donald G. Thompson, Ms. Melissa Weets Anderson, and Mr. David E. Mullin, Bradley & Riley, P.C., Attorneys at Law, P.O.

Box 2804, Cedar Rapids, Iowa 52406, on the 4th Day of October, 1994.

/s/ Mark S. Soldat

This petition
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ATTORNEYS FOR
M. HAROLD EZZONE

PETITION

Pursuant to Rule 27, I.R.A.P., and with respect to the 9/21/94 opinion herein, M. Harold Ezzone petitions this court for a rehearing *en banc*, after opportunities for further briefing and oral argument. The points of law and fact overlooked or misapprehended are delineated in the argument which follows, as well as in the LaRosa petition/argument, both of which are incorporated by reference.

ARGUMENT

I. Ezzone holds no illusions. He realizes that rehearing, let alone the rehearing petitioned, is virtually unprecedented. Still, he petitions and retains hope because the appellate action taken is equally or more unprecedented:

– When was the last time that this court granted relief, (here, over a million dollars' worth), which never was sought in either the trial court or the appellate court?

– When was the last time that this court interfered with a jury verdict acknowledged to be supported by substantial evidence, to be consistent with the instructions given, and to be not the result of passion and prejudice?

– When was the last time that this court announced a new legal rule without explicitly applying, (other than by conclusions), its criteria to the case facts, or for that matter, without specifying how its otherwise-abstract criteria would be applied in future appeals?

– When was the last time a panel of this court *sua sponte* fashioned such a sweeping and radical departure from longstanding precedent, (here, appellate review rules), without participation *en banc*, participation by the immediate litigants, or participation by any member of the bar?

II. Indeed, it is this last question which most deeply troubles Ezzone and his counsel. The panel stated that "[*i*]*n accordance with a rule* now *mandated* by the United States Supreme Court, we review and reduce the punitive damages awards." (opin., at 3-4, *emph. supp.*) The panel further stated "that we are now *obligated as matter of constitutional law, [due process],* to assume responsibility for reviewing the appropriateness of the size of punitive damages awards . . . "[1] (*Id.*, at 25, *emph. supp.*) Yet, in the *sua sponte* discharge of this "due process" in favor of the Hansens, it afforded Ezzone *no due process* whatsoever.

It is immutable that the "[t]wo main requirements of the due process clause of amendment 14 are (1) notice and (2) an opportunity to be heard." *Cedar Rapids Human Rights Commission v. Cedar Rapids Community School District*, 222 N.W.2d 391, 401 (Iowa 1974). "To comport with due process, a person *must* ordinarily *be informed somehow of the issues involved* in order to prevent surprise . . . and allow an opportunity to

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[1] Concerning the "rule" and the "obligation", a seeming enigma is noted prefatorily. That is, the court stated that it was fulfilling a constitutional "mandate" and "obligation", but also stated that "no constitutional question is presented here . . . " (*Id.*) Furthermore, as denoted *infra*, pp. 7-8, there does not appear to be any "mandate" at all, except for review systems inapposite to Iowa's, such as the Oregon system recently reviewed.

prepare." *Wedergren v. Board of Directors*, 307 N.W.2d 12, 16 (Iowa 1981), (*emph. supp.*). "[T]he 'root requirement' of the due process clause . . . [is] the 'opportunity for hearing *before* [a person] is deprived of any significant property interest.' " *Lee v. Giangreco*, 490 N.W.2d 814, 817 (Iowa 1992), (*emph. supp.*). Therefore, though Ezzone had no pre-judgment right to punitive damages, he certainly had a post-judgment "property interest" in them protected by pre-deprivation due process. *Shaw v. Addison*, 236 Iowa 720, 727, 18 N.W.2d 796, 800-801 (1945); *Auxier v. Woodward State Hospital-School*, 266 N.W.2d 139, 142 (Iowa 1978); *Shepherd Components, Inc. v. Brices-Petrides-Donohue & Associates, Inc.*, 473 N.W.2d 612, 619 (Iowa 1991).

In the appellate context, there were only 4 ways Ezzone could have been "informed somehow of the issues" involving a punitive damages judgment reduction: (i) if the Hansens had preserved such an issue in post-judgment motions; (ii) if the Hansens had urged it in their appellate arguments; (iii) if this court had adopted its new rule prospectively in an earlier opinion; or (iv) if this court had notified Ezzone of its impending consideration of a new rule *and then* had given him an opportunity to be heard on why it should not be adopted and why its criteria, (clearly-articulated in this notice), should not be applied to his case facts. To date, however, Ezzone has been given no such notices. *Compare, Spaur v. Owens-Corning Fiberglass Corporation*, 510 N.W.2d 854, 857, 864-869 (Iowa 1994), [*e.g.*, "Constitutional objections were raised by OFC prior to and during trial . . . On appeal OFC urges . . . "]; *Matter of Estate of Borrego*, 490 N.W.2d 833, 837-838 (Iowa 1992), [general notice of attorney fee issue insufficient to apprise of specific attorney fee issue].

Moreover, it simply cannot be said that Ezzone should have anticipated the new rule. Quite the contrary, he was justified in assuming that if the Hansens did not preserve the issue of whether the punitive damages were "out of proportion to any amount needed . . . for deterrence purposes. . . . " (opin., at 26), then there was no such issue to be heard:

> It is a basic rule of appellate procedure that questions not presented to and not passed on by the trial court cannot be raised or reviewed on appeal. *Cit.* The theory under which a case was tried in the trial court will be the theory upon which an appeal is based. *Shill v. Careage Corporation*, 353 N.W.2d 416, 420 (Iowa 1984).
>
> *However sympathetic* we may be, we will not address issues, *even of constitutional magnitude*, not presented to the trial court. *In Re Staros*, 280 N.W.2d 409, 411 (Iowa 1979), (*emph. supp.*).

He also was justified in assuming that if the Hansens did not assign this issue, it would be deemed waived,[2] *Miller v. Griffith*, 246 Iowa 476, ___, 66 N.W.2d 505, 508-509 (1954); *Henneman v. McCalla*, 260 Iowa 60, ___, 148 N.W.2d 447, 458-459 (1967); *Moore v. Vanderloo*, 386 N.W.2d 108, 113 (Iowa 1986), and this court would not resurrect it in any case on appeal:

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[2] In the Hansens' brief in response to Ezzones', pp. 42-46, the most they argued was a general issue, namely that the evidence of their misconduct was insufficient to submit punitive damages to the jury. As a corollary, they certainly did not argue the specific issue, namely that the amount of punitive damages awarded were out of proportion to those needed for deterrence purposes.

> To reach the merits of this case would require us to assume a partisan role and undertake the appellant's research and advocacy. This role is one we refuse to assume. *Ingraham v. Dairyland Mutual Insurance Company*, 215 N.W.2d 239, 240 (Iowa 1974).

Ezzone further was justified in assuming that even if the Hansens had preserved and assigned the issue, this court still would not climb into the jury box, (or the trial judge's chair), so as to find the punitive damages facts *de novo*:

> It is *not for us to weigh the evidence.* To do so is the jury's function. *Walker v. Sedrel*, 260 Iowa 625, ___, 149 N.W.2d 874, 879 (1967), (*emph. supp.*).
>
> So we think there was a *fair trial,* the case was *fairly submitted to the jury,* and the jury having found a verdict, and *the court having sustained the jury* in so doing, *and having entered judgment, the only thing we can do is abide by the verdict. Reardon v. Hermansen*, 223 Iowa 1207, ___, 275 N.W.2d 6, 10 (1937), (*emph. supp.*).
>
> On appeal from a law action tried to the court, as here, review in this court is only on errors assigned and the matter is *not triable de novo.* Under this limited extent of review the findings of fact by the trial court have the effect of a special verdict and are equivalent to a jury verdict. If supported by substantial evidence and justified as a matter of law, they are binding on us and the judgment will not be disturbed on appeal.
>
> Further, we *must construe the evidence in the light most favorable to the trial court's judgment,*

> whether contradicted or not, and this court will not weigh the evidence or pass on the credibility of the witnesses. *Carson v. Mulnix*, 263 N.W.2d 701, 705 (Iowa 1979), (*emph. supp.*).
>
> *Assessment of damages is* traditionally *left to the sound discretion of a jury*. . . . We will depart from that tradition only when the verdict is (1) flagrantly excessive or inadequate; (2) so out of reason as to shock the conscience or sense of justice; (3) presumptively the result of passion, prejudice or other ulterior motive; or (4) lacking in evidentiary support. . . . *Lee v. Giangreco*, 490 N.W.2d 814, 820 (Iowa 1992), (*emph. supp.*).

Against these time-tested precepts, it was reasonable for Ezzone to have assumed that if this court agreed with the trial court, (as it did), that there was sufficient evidence upon which the jury could find that the Hansens had participated in 3 intentional torts against him, (including stealing his property while holding the confidential roles of his banker, bank, and insurance agent), and that their "conduct . . . [in so doing] constituted willful and wanton disregard for . . . [his] rights . . . " §668A.1(1), Code of Iowa, then surely this court would have no reason to invade the jury's verdict, with or without prior notice. This assumption, of course was strengthened considerably by the trial judge's first-hand review of that verdict:

> This jury was presented with an extremely complex case with extensive instructions and twenty-eight special verdicts encompassing seventy pages. They were attentive throughout the length of this trial and spent a considerable amount of time in deliberations before reaching a verdict in this matter. The Court is satisfied

> that this verdict was the result of thoughtful discussions and the award is not the result of improper passions or prejudice. The award is supported by sufficient evidence in the record and was not excessive or clearly against the weight of the evidence. (app. 1036-1037.)

Both the jury and the trial judge attended the trial. They were privy to matters not appearing on the cold record, *i.e.* body language, eye contact, voice intonation, etc. They were unencumbered by advocate versions of the facts and invested with common sense. In other words, they were very competent and in the best position to answer all the fact questions answered anew by the panel, *viz.*: whether the Hansens were "provoked" into their "willful/wanton conduct" by Ezzone or simply seduced by their own greed and amorality; whether the Hansens were misled about or chose to overlook the financial statement falsity, and/or whether Ezzone knew anything about Riccardi's falsification of that statement; and whether taking one million of the Hansens' eight million dollar net worth, (including the pilfered Ezzone manufacturing process/profit), was necessary to punish and deter them.

After all, the jury was only a few feet from witness Willis Hansen when he was caught red-handed in unremorseful falsehood, (by the Cross impeachment). Thus, it was well within its province and the trial court's review to conclude that something greatly in excess of the $100,000.00 cost-of-doing-business punishment, (per the panel's reduction), was necessary to curb the intentional behavior of stealing, compounded by unrepentant perjury.

That the panel disregarded and failed to distinguish all the prior preservation, assignment, and fact-finding rules upon which Ezzone reasonably relied, *supra*, serves as testament to what can happen when the litigants are not permitted to frame and argue the appeal issues in accordance with due process. That the panel *sua sponte* formulated a new rule placing the court in the punitive damages role of super-jury, unfettered by any apparent criteria for ascertaining just how much is necessary to deter, serves as testament to just how dangerous it is for a court to alter *stare decisis* without prior participation by a single member of the bar. With these testaments in mind, therefore, Ezzone attempts to sketch in the space remaining that which should be briefed fully and considered upon rehearing.

Matters to be so considered include the facts that the legislature provided for jury fact-finding of punitive damages, subject to judicial instruction, post-verdict review, and appellate review safeguards that this court declared just a few months ago complied with the due process dictates of *Pacific Mut. Life Insurance Co. v. Haslip*, 499 U.S. 1, 18-24, 111 S.Ct. 1032, 1043-1046, 113 L. Ed.2d 1, 20-24 (1991). *Spaur, supra,* at 866-868. When revisited recently, the *Haslip* dictates were not changed. Instead, they were applied to void an Oregon review procedure, one which granted extremely-limited appellate review expressly "contrasted" with procedures identical to Iowa's. *Honda Motor Co., Ltd. v. Oberg*, ___ *U.S.* ___, 114 S.Ct. 2331, 2334-2342, ___, ___ L.Ed.2d ___ (1994). Consequently, if the legislature has not seen fit to change the Iowa system of fact-finding and safeguarding and if both supreme courts have declared this system constitutional,

what then is the justification for the judicial activism represented by the new rule?

Another matter to be so considered are the facts that in both *Spaur,* at 867-868, and *Oberg,* S.Ct. at 2340-2341, the concerns about appellate review adequacy had to do with concerns such as whether the jury had imposed punitive damages which could not be paid or which "threaten[ed] corporate existence . . . " or "use[d] their verdict to express biases against big businesses, particularly those without strong local presences . . . " or not followed the instructions. Such concerns, however, are not beyond traditional appellate review in Iowa. *Giangreco, supra.* Even more importantly in this appeal, such concerns were never raised. Consequently, what then is the justification for the judicial activism represented by raising concerns that the Hansens could have raised, but chose not to raise in the extant review process?

Finally, because there was insufficient delineation of the evidence warranting the conclusion that only 10% of the verdict was in proportion to any amount needed for deterrence purposes, Ezzone, (and every litigant who follows him), is left to wonder just what standards and reasons apply:

– If, notwithstanding the sufficiency of the evidence to submit the issue of whether a party's conduct is punishable, this court thinks that a particular victim is undeserving to receive the punitive damages, is that the standard, (and if so, why was that not left to the legislature to set)?

– If the verdict is "surprising" on the cold record, (opin., at 3), is that one of the "circumstances" of review, (opin., at 26)?

– What exactly constitutes "provocation", (opin., at 26), and given its victim orientation, just what is its nexus to punishment and deterrence of the willful wrongdoer?

– At exactly what point does the court abandon appellate review on assigned error under the "traditional factors" and begin *de novo* fact-finding under "all circumstances surrounding the conduct and relationship between the parties", (opin., at 26)?

– In short, does not the absence of clear review standards, coupled with unreviewable appellate fact-finding, create just as much of an unconstitutional risk of arbitrary punitive damages awards, as did the Oregon law which provided no meaningful appellate review of jury fact-finding?

III. If Ezzone's amendment to add LaRosa is granted, there will be a rehearing-correctable inconsistency between: (1) "interest would run from Ezzone's filing, almost three years previously. . . . " (opin., at 27, 30, fn. 6); and (ii) "interest on her award will be allowed from the date of the filing of the motion, [3 years *after* 'Ezzone's filing']. . . . " (opin, at 29, fn. 5). The "relation back" provision of Rule 89, I.R.C.P, eliminates that inconsistency.

IV. The court confirmed that for parties to obtain a *pro tanto* credit, they *must* plead and *prove* "that without such a credit the plaintiff would receive more than full compensation for his or [her] injuries. . . . ' " (opin., at

33-34.) Though the Hansens mentioned this "affirmative defense" only in a "memorandum", they were forgiven for not pleading it, (*id.*, at 34), and though the Hansens offered no evidence to demonstrate this "affirmative defense", they also were forgiven for not proving it: "[D]efendants' memorandum asking for *pro tanto* credit was adequate for its application. . . . " (*id.*, at 35). Ezzone thus asks, how can an *unproven* defense be so "applied"?

V. In his 12/2/93 brief, pp. 45-48, Ezzone argued that even if the Hansens had proven their affirmative defense, the *pro tanto* credit should have been reduced by the punitive and malpractice damages that the jury would have awarded against Kennedy, over and above the compensatory damages awarded against the Hansens.[3] He also argued, pp. 48-49, that credit should not be given, until the settlement was paid, (interest to accrue up to then). The court did not address these arguments in its opinion, but should have.

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[3] Notably, these arguments were different than those addressed, *viz.* whether a credit could offset the punitive damages assessed against the Hansens. (opin., at 35, 37.)

IN THE SUPREME COURT OF IOWA
No. 273 / 93-855

M. HAROLD EZZONE, and PATRICIA L. LaROSA, vs.	Petitioner-Appellant-Cross Appellee, Intervenor-Appellant-Cross Appellee,
RONALD RICCARDI, a/k/a "RICK" RICCARDI, and	Defendant-Appellee,
WILLIS M. HANSEN, DENNIS B. HANSEN, PRECISION OF NEW HAMPTON, INC., and STATE BANK OF LAWLER,	Defendants-Appellees-Cross Appellants.

PATRICIA L. LaROSA, vs.	Plaintiff-Appellant-Cross Appellee,
RONALD RICCARDI, a/k/a "RICK" RICCARDI, and	Defendant-Appellee,
WILLIS M. HANSEN, DENNIS B. HANSEN, PRECISION OF NEW HAMPTON, INC., and STATE BANK OF LAWLER,	Defendants-Appellees-Cross Appellants.

APPEAL FROM THE IOWA DISTRICT
COURT FOR CHICKASAW COUNTY
Hon. James C. Bauch, Judge

PETITION FOR PATRICIA L. LAROSA
FOR REHEARING

(Filed Oct. 7, 1994)

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PROOF OF SERVICE/CERTIFICATE OF FILING

I certify that on October 5, 1994, I will serve this Petition Of Patricia L. LaRosa for Rehearing, by depositing eighteen (18) copies of the foregoing in the U.S. Mail, postage prepaid, addressed to the Clerk of the Supreme Court of Iowa, Statehouse, State Capitol, Des Moines, IA 50319, and two (2) copies to all other parties through their respective attorneys, Mark S. Soldat, Attorney at Law, 714 East State Street, Algona, Iowa 50511, Mary Jane White, Attorney at Law, 405 West Main Street, Waukon, Iowa 52172, Andrew F. Van Der Maaten, Anderson, Wilmarth & Van Der Maaten, Attorneys at Law, P. O. Box 450, Decorah, Iowa 52101, Mark McCormick, Belin, Harris,

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/s/ Electronic Printing & Copy Ctr.

This Petition is respectfully submitted by:

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/s/ Dean A. Spina
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PETITION FOR REHEARING

Patricia L. LaRosa ("LaRosa"), by counsel, petitions this Court for a rehearing *en banc* pursuant to Iowa Rule of Appellate Procedure 27 and joins in the Petition for Rehearing filed by M. Harold Ezzone.

BACKGROUND

After a lengthy trial, the jury in this case awarded LaRosa compensatory damages in the amount of $350,000.00 for which the Defendants are jointly and severally liable. The jury further awarded LaRosa punitive damages against the Defendants as follows: $450,000.00 against Willis Hansen; $59,900.00 against Dennis Hansen; and $365,000.00 against State Bank of Lawler.[1]

In denying Defendants' post-trial motions, the trial judge observed:

> This jury was presented with an extremely complex case with extensive instructions and twenty-eight special verdicts encompassing seventy pages. They were attentive throughout the length of this trial and spent a considerable amount of time in deliberations before reaching a verdict in this matter. The Court is satisfied that this verdict was the result of thoughtful discussions and the award was not the result of improper passions or prejudice. The award is supported by sufficient evidence in the record

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[1] "Defendants" refers to Willis and Dennis Hansen and State Bank of Lawler. The jury also awarded $3,000,000 in punitive damages against Defendant Riccardi who did not appear at trial and was not involved in this appeal.

and was not excessive or clearly against the weight of the evidence. (App. 1036-1037).

On September 21, 1994, a panel of this Court[2] filed its opinion affirming the findings on liability and compensatory damages but remitting, *sua sponte*, nearly ninety percent (90%) of the punitive damages awarded to LaRosa by the jury. (Opin. 24-27). Since the punitive damages issue on which the Court remitted was not urged on appeal, and the parties were given no opportunity to be heard on this issue, the punitive damages awarded by the jury should be reinstated, or alternatively, LaRosa should be given the opportunity for briefing and oral argument on this issue.

ARGUMENT

I. CONTRARY TO LONG-STANDING PRECEDENT, AND PROCEDURAL DUE PROCESS, A PANEL OF THIS COURT REMITTED LaROSA'S PUNITIVE DAMAGE AWARD EVEN THOUGH THE AMOUNT OF THE AWARD WAS NOT ASSIGNED AS ERROR BY THE DEFENDANTS ON APPEAL.

In their appeal, the Defendants urged and argued two issues with respect to the award of punitive damages. First, insufficiency of evidence to submit punitive damages to the jury. Second, error in the submission of any of the predicate tort claims. (Appellees' Brief in Appeal of LaRosa, 32-38). The panel rejected the first contention and did not reach the second since the panel

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[2] This appeal was considered by McGiverin, C.J., and Harris, Lavorato, Neuman and Ternus, JJ.

affirmed on all tort claims. Defendants did not assign as error that the punitive damage award was excessive. Consequently, none of the parties briefed or argued this issue.

Nevertheless, contrary to long-standing Iowa precedent, the panel ordered remittitur. Specifically, the panel reduced LaRosa's punitive damages awards to $90,000.00 against Willis Hansen (down from $450,000.00); $6,000.00 against Dennis Hansen (down from $59,900.00); and $1,000.00 against State Bank (down from $365,000.00).

Thus, the panel reduced the jury punitive damage award for LaRosa against these Defendants from $874,900.00 to $97,000.00 – a reduction of nearly ninety percent (90%).[3]

In an action at law, the Court's review is for correction of errors of law. Iowa R.App.P. 4. Review is only on errors assigned. *Manson State Bank v. Diamond*, 227 N.W.2d 195, 199 (Iowa 1975). In *Tratchel v. Essex Group, Inc.*, 452 N.W.2d 171 (Iowa 1990), Essex Group, like the Defendants here, urged on appeal that punitive damages should not have been submitted to the jury. Unlike the Defendants in this appeal, however, Essex Group raised questions in footnotes in its brief concerning the constitutionality of punitive damage awards and the issue of remittitur. The Court in *Tratchel* refused to rule on these issues, stating "[a]s [Essex Group] did not raise either of these matters as an issue on appeal, we do not address

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[3] The respective reductions were eighty percent (80%) for Willis, ninety percent (90%) for Dennis, and ninety-nine and seven-tenths percent (99.7%) for State Bank of Lawler.

them. *Id.* at 176, n.1.[4] In the present appeal, the Defendants failed to even mention these issues in their briefs, yet the panel here reached out to address the amount of punitive damages awarded by the jury.

The panel's decision misinterprets *Honda Motor Co. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994), as mandating the remittitur ordered in this appeal. *Oberg* involved an aberrant state law that precluded any inquiry into the amount of the damages. ___ U.S. at ___, 114 S.Ct. at 2338 (Oregon's "lonely eminence"). Iowa law does not preclude such inquiry into the amount of the jury's award. In fact, the Court recently confirmed its procedure for review of punitive damage awards as consistent with the requirements of *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 867 (Iowa 1994) (compensatory damages of $1,404,710.93; punitive damages of $1,500,000.00).

LaRosa was entitled to notice and opportunity to be heard before the Court reduced the punitive damages award. Fundamental procedural protections, notice and opportunity to be heard, accompany vested rights. *Lee v. Giangreco*, 490 N.W.2d 814, 817 (Iowa 1992).

The district court judgment is a final adjudication of the rights of LaRosa against the Defendants. *Moreno v. Vietor*, 261 Iowa 806, 156 N.W.2d 305, 309 (1968). Clearly, a judgment for compensatory and punitive damages is property to which a judgment creditor has protected

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[4] *Tratchel* was considered by McGiverin, C.J., and Harris, Schultz, Neuman and Andreasen, J.J.

rights. *See Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc.*, 473 N.W.2d 612, 219 [sic, 619] (Iowa 1991) (no vested right to punitive damages *prior* to entry of judgment).[5]

An opportunity to be heard regarding the amount of punitive damages awarded Plaintiff LaRosa is crucial for a proper functioning of appellate review. For example, in announcing new factors to be considered on review and then applying them, the Court exceeded the issues raised by the Defendants and reviewed the jury verdict on the basis of factors outside the law of the case, without giving LaRosa an opportunity to be heard on any of these issues.

The amount of punitive damages in this case does not implicate, on the record, any constitutional basis for interfering with the jury verdict. There is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable." *Haslip*, 499 U.S. at 18, 111 S.Ct. at 1043, 113 L.Ed.2d at 1. Nonetheless, the amount here is not grossly excessive nor does it jar one's constitutional sensibilities. *Id.* at 1046 & n.11 (affirming punitive damages, awarded on a standard of the preponderance of the evidence, that was more than four (4) times amount of compensatory damages).

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[5] "No appeal shall vacate or affect the judgment appealed from . . . " Iowa R.App.P. 7. A party may obtain stay of proceedings under a judgment by filing a supersedeas bond. *Id.* However, the supersedeas bond does not work to "deprive a judgment of its force, only to withhold moving upon the judgment debtor." *Edge v. Harsha*, 334 N.W.2d 741, 742 (Iowa 1983).

In the present case, the *total* punitive damage award for LaRosa was only 2.5 times the amount of compensatory damages.[6] When the punitive damages are measured against the compensatory damages awarded against each Defendant, the respective factors are 1.29 for Willis Hansen, 0.17 for Dennis Hansen, and 1.04 for State Bank of Lawler. The awards do not exceed the common treble damages found in many statutes. The jury's verdict does not exceed the compensatory damages by a factor that is of constitutional moment. Rather the award is needed to deter Defendants and others from the economic calculations that precipitate similar bad acts. *TXO Production Corp. v. Alliance Resources Corp.*, ___ U.S. ___, ___, 113 S.Ct. 2711, 2721-28, 125 L.Ed.2d 366, ___ (1993).

The panel's decision violates the basic underpinning of our appellate review in actions tried at law – appellate courts decide issues presented by the parties, with the benefit of the briefing and argument of counsel. That this principle is important to the process is illustrated by a comparison between the detailed analysis of punitive damages issues presented, briefed and argued by the parties in *Spaur*, and the cursory treatment of the punitive damage issue not briefed or argued by the parties in this case.

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[6] When the compensatory and punitive damages for LaRosa and Ezzone are combined, the factor is only 1.87 ($1,260,572.00 ÷ $675,000.00).

II. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE VERDICT, THE PANEL SHOULD NOT HAVE REDUCED LaROSA'S PUNITIVE DAMAGE AWARD.

The panel, throughout its opinion, repeatedly acknowledged that the facts must be viewed in the light most favorable to the verdict. Thus, in considering the jury's verdicts on the interference, conversion, concert of action and confidential relationship claims, the panel "view[ed] the evidence in the light most favorable to the plaintiff[s]." (Opin. 8, 10, 21-23). Likewise, in holding that an award of punitive damages was appropriate in this case, the panel accepted, "as [it] must, plaintiffs' version of the evidence." (Opin. 25).

Yet in reviewing the *amount* of LaRosa's punitive damage award, the panel suddenly viewed the evidence in the light most favorable to the Defendants. Specifically, the panel (but not the jury) found that LaRosa "backed Ezzone's misrepresentations about the business to the Hansen defendants."[7] (Opin. 26-27). Viewing the evidence in the light most favorable to LaRosa, the jury could reasonably find that she did not "back" anyone's misrepresentations about the business. The panel should have viewed the evidence concerning this issue in the light most favorable to LaRosa, as courts are obligated to with respect to awards of punitive damages. *See TXO, supra* ___ U.S. at ___, 113 S.Ct. at 2714-15, 125 L.Ed.2d at 366 (1993) ("The jury verdict in respondents' favor . . .

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[7] While it is unclear whether the panel held that LaRosa provoked the Defendants, they did not plead such a defense and no instruction was given to the jury on this issue.

makes it appropriate to accept respondents' version of disputed issues of fact."); *Potthoff v. Jefferson Lines, Inc.*, 363 N.W.2d 771, 778 (Minn. App. 1985) ("Viewing this evidence in the light most favorable to the verdict, the jury could have found that this was a reasonable amount to punish [defendant] and deter similar arbitrary acts in the future."); *See also, Wiles v. Myerly*, 210 N.W.2d 619, 632 (Iowa 1973) (compensatory damages – "In considering defendants' contention the verdicts were so excessive as to shock the conscience and show passion and prejudice, we must take the evidence in the aspect most favorable to plaintiff which it will reasonably bear. We must also give weight to the fact the trial court, with benefit of seeing and hearing the witnesses, observing the jury and having before it all incidents of the trial, did not see fit to interfere.")

It is clear that Mr. Riccardi, not LaRosa, provided financial information before Willis Hansen visited Florida. (App., 213, Tr. 214-16). During Willis' visit to Florida, LaRosa depended heavily upon Mr. Riccardi to deal with the necessary financial matters. *Id.* Importantly, LaRosa did not sign the financial statement Mr. Riccardi provided to Willis in Florida, she didn't provide any information in order for the financial statement to be completed, and she didn't review any of the information on the financial statement with anyone. *Id.* Under these facts, the jury could reasonably conclude that LaRosa did not "back" anyone's misrepresentations.

Concerning the panel's finding that approximately ten percent (10%) of the punitive damages awarded

LaRosa is sufficient deterrence[8] for these Defendants, it is important to consider the conduct the jury punished and attempted to deter. The Defendants actively assisted Mr. Riccardi in posing as president, sole director and sole shareholder of PTCI. This acceptance allowed Mr. Riccardi to treat the PTCI bank account as his own so he could drain the insurance proceeds from the fire. It also allowed him to sell the assets of PTCI to Willis and Dennis and to receive $250,000.00. Willis/State Bank gave Mr. Riccardi further assistance by wiring $150,000.00 to a Riccardi account and by creating a $100,000.00 certificate of deposit solely in Mr. Riccardi's name, primarily with funds that Willis and Dennis paid for assets belonging to Ezzone and LaRosa.

The Court has previously held that it "do[es] not disturb jury verdicts pertaining to damages unless they are flagrantly excessive or inadequate, so out of reason as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support." *Harsha v. State Savings Bank*, 346 N.W.2d 791, 799 (Iowa 1984). The duty to determine damages is peculiarly one for jury,[9] and only in cases where it clearly appears that the verdict is the result

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[8] In deciding the deterrence issue, the panel did not discuss the net worth of each Defendant, which were stipulated follows: Willis ($6,309,446.00), Dennis ($815,175.00) and State Bank of Lawler ($7,623,000.00). (Tr. 1879-80).

[9] Furthermore, the jury clearly distinguished between and among the Defendants and Plaintiffs and awarded LaRosa greater damages. *See Fishman v. Clancy*, 763 F.2d 485, 490 (1st Cir. 1985) (variations in amount of punitive damages against various defendants demonstrated the jury "carefully considered the question").

of passion and prejudice, disregard of the evidence or misunderstanding of the law, will an appellate court interfere. *Booth v. General Mills, Inc.*, 243 Iowa 206, 49 N.W.2d 561, 563 (1951). Moreover, the mere fact that the reviewing court, if sitting as trier of fact, might have allowed a smaller award does not justify interference with the verdict. *Brophy v. Iowa-Illinois Gas & Electric Co.*, 254 Iowa 895, 119 N.W.2d 865, 867 (1963).

Here, it cannot be argued that the punitive damage award was the result of passion or prejudice. As the trial court stated in its denial of Defendants' post-trial motions, " . . . this verdict was the result of thoughtful discussions and the award was not the result of improper passion or prejudice." (App. 1036-1037). Unlike in other decisions involving out-of-state defendants or large corporate defendants, the New Hampton jury that awarded punitive damages to LaRosa, a resident of West Virginia, and against two prominent New Hampton businessmen and a hometown bank, cannot be said to have been influenced by passion or prejudice. *Compare Spaur, supra* at p.4, where such prejudice was a concern. Rather, it was the Defendants' conduct, as found by the jury, that resulted in the punitive damage award.

CONCLUSION

For all of the above reasons, Patricia L. LaRosa requests that the punitive damages award be reinstated, or alternatively, she be given an opportunity for briefing and oral argument on the punitive damage issue.

IN THE SUPREME COURT OF IOWA

No. 93-855

Chickasaw County Nos. CL27-11-91, CL14-4-88

ORDER

(Filed Dec. 15, 1994)

M. HAROLD EZZONE,
Plaintiff-Appellant,

PATRICIA L. LaROSA,
Intervenor-Appellant,

vs.

RONALD RICCARDI, et al.,
Defendants-Appellees.

PATRICIA LaROSA,
Plaintiff-Appellant,

vs.

RONALD RICCARDI, et al.,
Defendants-Appellees.

Each of the parties has filed a petition for rehearing. These petitions, together with briefs in support of and resistance to them, have been considered en banc by the court.

The petitions have presented a large number of issues, all of which have been carefully considered. Two merit special mention. Both concern a question of preservation of error.

Defendants-appellees challenge the court's holding that their challenge to plaintiffs' theory of liability was lost when explained in a jury instruction. This court's

opinion found there was no objection to the instruction, a finding defendants vigorously challenge. Defendants correctly note they did object to the instruction. The flaw in the present challenge is in the nature of that objection. It did not assail plaintiffs' legal theory (the point raised on appeal). The objection was confined to two things: (1) there was insufficient evidence to submit interference claim; and (2) plaintiffs were not real parties in interest.

Like many disputes in this complex litigation, this one is not entirely free from doubt because plaintiffs did assail the theory at other points during the trial. But we continue to think the instruction became the law of the case, and do not think our persistence is hypertechnical.

The second point we specially note has to do with plaintiffs, challenge to the reduction in the punitive damage award, a challenge we do think is hypertechnical. Plaintiffs contend error was not preserved for this reduction when not spelled out in the assignment of error in which defendants challenge punitive damages.

Whatever deficiency plaintiffs allege in the scope of defendants' assignment challenging the punitive damage award, they cannot suggest we introduced the matter into the dispute. Defendants complained of the sufficiency of evidence of punitive damage at every stage of the trial, and challenged the award in a motion for judgment notwithstanding the verdict and for a new trial.

Defendants' complaint could be answered easily if we, as we have in the past, claimed inherent authority to order remittiturs. *See Castner v. Wright*, 256 Iowa 638, 659, 127 N.W.2d 885, 886 (1956) (supplemental opinion). The claim of our inherent authority dates from the earliest

days of our court. *See Gower v. Carter*, 3 Iowa 243, 256 (1856). We would claim this inherent authority only in rare situations and with reluctance. We need not rely on inherent authority here because of a special rule that in some situations intermingles concepts of excessiveness and appropriateness.

Prior to our decision in this appeal, because we heretofore refused to review punitive damage awards as to amounts, we established no precedent regarding error preservation on the precise question plaintiffs raise. There is however ample precedent on a closely analogous question in the field of compensatory damages. There we have consistently intermixed the concepts of appropriateness of damages and extent of damages. This has occurred routinely in considering motions for a new trial under Iowa rule of civil procedure 224 on a claim of passion and prejudice. The rule is that a new trial should not be awarded, but rather a remittitur should be ordered for the excess, "even in the absence of passion and prejudice [when] justice may be effectuated by ordering a remittitur. . . . " *Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632, 659 (Iowa 1969). *See also Hurtig v. Bjork*, 258 Iowa 155, 160, 138 N.W.2d 62, 65 (1965); *Larew v. Iowa State Highway Comm'n*, 257 Iowa 64, 68, 130 N.W.2d 688, 690 (1964); *Castner*, 256 Iowa at 657, 127 N.W.2d at 583, 594 (initial opinion).

We find no merit in plaintiffs' complaint that defendants' challenge to the punitive damage award did not carry with it a challenge to its extent. This court had ample authority to consider the extent, as well as the appropriateness of, that award.

We have considered the parties' other contentions and find them without merit. The opinion did contain one clerical and one substantive error. The substantive error, not challenged in the petitions for further review, related to the reduction of punitive damage awards which were in the nature of a remittitur. We omitted according the option of electing a new trial to these plaintiffs. *See Hester v. Meewes*, 256 Iowa 633, 636-37, 126 N.W.2d 308, 310 (1964) (court without power to order reduction of jury award; plaintiff must be accorded option of new trial).

Pursuant to Iowa Supreme Court rule 8.1 our opinion, filed September 21, 1994, is amended as follows:

1. Page twenty-five line sixteen is amended to read as follows:

damage awards. Since our decision in *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (Iowa 1994), the United States

2. a. Page twenty-six lines twenty-two and twenty-three are amended to read as follows:

deterrence purposes. Ezzone's punitive damages should be no more than the following amounts:

b. Page twenty-seven line five should be amended to read as follows:

purposes. LaRosa's punitive damages should be no more than the following amounts:

c. After the tenth line on page twenty-seven the following sentence should be added:

Upon remand the district court shall order a new trial as to either plaintiff who fails to file a remittitur accepting the amounts mentioned.

Corrected pages are attached.

All petitions for rehearing are denied and overruled. Dated this 15th day of December, 1994.

THE SUPREME COURT OF IOWA

By /s/ David Harris
David Harris, Justice

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IN THE SUPREME COURT OF IOWA

M. HAROLD EZZONE, Plaintiff-Appellant/ Cross Appellee, and	S. Ct. No. 93-855
PATRICIA L. LaROSA, Intervenor-Appellant/ Cross Appellee,	
vs.	MOTION TO
RONALD RICCARDI, a/k/a "RICK" RICCARDI, Defendant-Appellee, and	RECONSIDER AND/OR REHEAR
WILLIS M. HANSEN, DENNIS B. HANSEN, PRECISION OF NEW HAMPTON, INC., and STATE BANK OF LAWLER, Defendants-Appellees/ Cross Appellants.	(Filed Dec. 22, 1994)
PATRICIA L. LaROSA, Plaintiff-Appellant/ Cross Appellee,	
vs.	
RONALD RICCARDI, a/k/a "RICK" RICCARDI Defendant-Appellee, and	
WILLIS M. HANSEN, DENNIS B. HANSEN, PRECISION OF NEW HAMPTON, INC., and STATE BANK OF LAWLER, Defendants-Appellees/ Cross Appellants.	

Pursuant to Rules 22 and 27, I.R.A.P., M. Harold Ezzone, ("Ezzone"), by counsel moves, (or alternately petitions), this court *en banc* to reconsider, (or alternately rehear), the correction it made in its 12/15/94 order to the "substantive error" contained in its 9/21/94 opinion. The reconsideration and/or rehearing sought is that rather than this court determining the issues of excessiveness of punitive damages, (for the purpose of a remittitur rule), and of the amount of punitive damages to be remitted, it should remand those issues to the trial court for determination.

In support of this motion, it is stated that:

1. Because the remittitur option of new trial never was contained in the 9/21/94 opinion, Ezzone could not have petitioned previously for rehearing with respect to it or anticipated the need to address the issue of who first would determine the questions of excessiveness and the optional remitted amount. Therefore, he properly seeks by reconsideration and/or rehearing the corrections he believes need to be made in the correction the court made by its 12/15/94 order. *See, Goecke v. Schoel*, 257 Iowa 504, ___, 132 N.W.2d 481, 482 (1965); *Hayes v. Kerns*, 387 N.W.2d 302, 308 (Iowa 1986).

2. One of the arguments Ezzone made in his rehearing petition was that it was improper for an appellate court to invade the province of the jury by making fact findings of its own on what was the appropriate amount of punitive damages to be imposed upon the Hansens as intentional tort wrongdoers. In its 12/15/94 order, p. 4, this court responded to this argument by admitting that it erred by reducing directly the amount of the punitive

damages awarded to Ezzone by the jury. It then employed the longstanding fiction used with respect to compensatory damages that the court can avoid invading the province of the jury by fact finding how much of the damages are excessive, not supported by the evidence, etc., and then giving the plaintiff the choice to accept that fact finding, (that the appellate court could not otherwise impose), or to seek a new trial fact finding by a second jury.

3. For the purposes of this motion, the difficulty Ezzone has with the court's conceded-error correction is that when borrowing the remittitur-choice rule from the field of compensatory damages, it failed to abide by all of its terms. More specifically, it failed to recognize that such a rule is supposed to be applied by the trial court discretionarily and then reviewed, (not applied), by the appellate court upon an abuse of discretion standard alone:

(a) At the remittitur rule's roots, there seems to be very little question, but that the determination of whether to grant the new trial/remittitur choice is one foundationed in fact, not law, and one to be made by the trial court, not the appellate court:

> The question of whether the verdict was excessive was not one of law, but was a question of fact under the record made, and the answer was one resting in the legal discretion of the court. The matter for determination of this court is whether that discretion was abused. *In Re Hollis' Estate*, 235 Iowa 753, ___, 16 N.W.2d 599, 602 (1944).

(b) Moreover, the reasons the fact-finding function has been placed with the trial court, instead of the appellate court, are not only because there should be at least one judicial tribunal which should act as a fact-finding review body, (for at-law correction of error), but also because this court has acknowledged that the trial court normally is in a superior position to make the fact determination which is peculiar to the remittitur issue:

> We have examined the record in this case, not for the purpose of ascertaining and determining whether the case should or should not be reversed, had the court overruled plaintiff's motion, but simply to ascertain and determine whether the trial court abused it discretion in sustaining the motion. It has been wisely held that a large discretion is lodged in the trial court in granting new trials. That this means a sound judicial discretion, to be exercised with care, judgment, and sound discretion in light of all the evidence and all the facts in the particular case appearing in the trial, is conceded. That the courts have no right to set aside the verdict of a jury through mere caprice or whim, or to reweigh the evidence submitted, or sit in judgment on the credibility of witnesses, is too well recognized to need argument. It does not appear that the court did this, or attempted to do this.
>
> The trial court had, and always has, an opportunity to observe the trial as it proceeded step by step, the parties, their counsel, the witnesses and the jury, that this court has not and can never have, and many things occur and are known to that court that may, and often do, convince the court that a fair and impartial trial has not been had. And yet these things so

observed may not, and many times cannot, be made to appear in the record. *Post v. City of Dubuque*, 158 Iowa 224, ___, 139 N.W. 471, 472 (1913).

****

As a general rule we are and should be reluctant to reduce verdicts of juries undistributed by the best judgment of the trial court who saw and heard the witnesses. *Newman v. Blom*, 249 Iowa 836, 851, 89 N.W.2d 349, 359 (1958).

****

The allowance of damages is primarily for the jury and we should not substitute our judgment for theirs unless it clearly appears the verdict is the result of passion and prejudice or is unconscionable or clearly not warranted by the evidence. *Cits.* And we are reluctant to interfere where the trial court who (*sic*) has the benefit of seeing and hearing the witnesses and observing the jury does not disturb the verdict. *Von Tersch v. Ahrendsen*, 251 Iowa 115, ___, 99 N.W.2d 287, 292 (1959).

****

We are also committed to the rule that in considering questions arising upon matters such as this, (*i.e.*, whether to order remittitur), we must take the evidence in the aspect most favorable to the plaintiff which it will reasonably bear. It will not avail the defendants to rely upon evidence in the record favorable to them if there is other evidence which fairly supports the verdict and judgment rendered in the trial court. We *must* also *give weight* to the fact that the trial court, which has had the benefit of seeing and

hearing the witnesses, observing the conduct of the jury, and has before it all the incidents and the entire picture of the trial, has not seen fit to interfere. *Fredrickson v. Heline*, 252 Iowa 92, ___, 106 N.W.2d 74, 76 (1960), [*emph. supp.*].

****

The trial court has greater powers in granting a new trial or ordering a remittitur because of the size of the verdict than we do. Its opportunity to observe the nature and effect of the testimony is greater. Our function to interfere should be exercised sparingly, and only when the record is clear the jury has not fairly responded to the evidence and instructions. *Nelson v. Iowa State Highway Commission*, 253 Iowa 1248, ___, 115 N.W.2d 695, 698 (1962).

****

The trial court has broad discretion in granting a new trial conditional upon a remittitur to a set amount. We will not interfere with its ruling on a motion for a new trial unless there appears to have been an abuse of discretion. *Cits.* The discretion extends to the amount of the remittitur as well as the decision to grant or refuse a new trial. *Grant v. Thomas*, 254 Iowa 581, ___, 118 N.W.2d 545, 548 (1962).

****

The trial court carefully considered defendant's contention of excessiveness and thereafter overruled defendant's motion. While not controlling, the rule is well established we are and should be reluctant to reduce verdicts of juries undisturbed by the best judgment of the trial court who also saw and heard the witnesses. *Brophy v. Iowa-Illinois Gas and Electric*

> *Company*, 254, Iowa 895, ___, 119 N.W.2d 865, 867 (1963).
>
> ****
>
> We must also give weight to the fact the trial court, with benefit of seeing and hearing the witnesses, observing the jury and having before it all incidents of trial, did not see fit to interfere. *Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632, 660 (Iowa 1969).
>
> ****
>
> In passing on the alleged excessiveness of damages, we need to determine only whether there was substantial evidence to support the verdict. *Cit.* We have noted that the trial court is generally in a better position to determine whether the evidence was sufficient to justify an award based on the observations of the trial court. *Cit. Clarey v. K-Products, Inc.*, 514 N.W.2d 900, 903 (Iowa 1994).

(c) Finally, aside from being in the best position to make the fact determinations peculiar to the remittitur rule, the trial court here also was the body to which the Hansens' new trial motion under Rule 244(d)(e)(f) (h), I.R.C.P., was addressed, and thus should be the first judicial body to resolve it under the correct legal principals [sic]:

> Seldom has this court reversed an order granting a new trial. The discretion vested in the trial court at this point is an important one, and is entitled to every favorable presumption here. . . .
>
> It is urged by the appellate that this, [new trial grant because substantial justice not done], was

> an interference with the prerogatives of the jury. If so, it was an interference that is *provided for by the statute. Crider v. McColley*, 154 Iowa 671, ___, 135 N.W., 364 (1912), [*emph. supp.*].

In this regard, of course, this court clarified in its 12/15/94 order, pp. 2-4, that it was not exercising inherent authority to order remittitur and that the punitive damages amount issue it had reviewed came to it *via* the Hansens' new trial motion, (made pursuant to Rule 244).[1]

3. In the trial court's ruling on the Hansens' new trial motion, it held as follows:

> The Court is satisfied that this verdict was the result of thoughtful discussions and the award is not the result of improper passions or prejudice. The award is supported by sufficient evidence in the record and was not excessive or clearly against the weight of the evidence. (app., p. 1037.)

Under the quotations contained in paragraph 2(b), *supra*, that holding should have been reviewed only on an abuse of discretion standard. Since it does not appear to have been so reviewed, or to the extent that it was not, then it now should be so reviewed by reconsideration or rehearing, given that such a standard also necessarily was

---

[1] Besides, those, "rare situations", (not extant here), in which this court exercises "inherent authority" usually occur when a trial court's remittitur order has been nullified by the operation of Rule 250, I.R.C.P., and resultingly, the only way this court has of reinstating it is by the exercise of inherent authority. *E.g., Miller v. Young*, 168 N.W.2d 45, 53 (Iowa 1969); *Castner v. Wright*, 256 Iowa 638, ___, 127 N.W.2d 583, 128 N.W.2d 885, 886 (1964).

borrowed from the compensatory damage remittitur rule by the 12/15/94 order.

4. Alternatively, assuming *arguendo* that before its holding, the trial court could not have considered or contemplated the availability of a remittitur remedy or the testing of the punitive damages amount "with a view of the extent and nature of the outrageous conduct, the amount necessary for future deterrence, and with deference to the relationship between the punitive award and plaintiff's injury, as reflected in any award for compensatory damages. . . . [plus] all circumstances surrounding the conduct and relationship between the parties. . . . [including] provocation . . . [by] participation in the conduct complained of. . . . " 9/21/94 opinion, p. 26, then the trial court should have been given the first opportunity to apply this remittitur rule and those standards.

5. The obvious wisdom and dictates of the precedent quoted in paragraph 2(b), *supra*, (and necessarily implicit in the 12/15/94 corrective order), are that: (a) the trial court is in the better position and has the greater power to make the remittitur fact determinations; and (b) this court's proper appellate review is to permit the trial court to exercise the discretion necessary for such determinations, subject to its review for discretion abuse.

WHEREFORE, it is prayed that this motion be granted.

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CERTIFICATE OF SERVICE

The undersigned certifies 18 copies of the foregoing Motion to Reconsider and/or Rehear will be deposited in the U.S. Mail, postage prepaid, in an envelope addressed to the Clerk of the Supreme Court of Iowa on the 21th of December, 1994. The undersigned further certifies that 2 copies of the foregoing Motion to Reconsider and/or Rehear will be deposited in the U.S. Mail, postage prepaid, in envelopes addressed to each of the following counsel: Mr. Andrew F. Van Der Maaten, Anderson, Wilmarth & Van Der Maaten, Attorneys at Law, P.O. Box 450, Decorah, Iowa 52101; Mr. Mark McCormick and Ms. Margaret Callaghan, Belin, Harris, Helmick, Lamson & McCormick, Attorneys at Law, 2000 Financial Center, Des Moines, Iowa 50309-3989; Mr. Donald G. Thompson, Mr. Dean A. Spina, and Mr. David E. Mullin, Bradley & Riley, Attorneys at Law, P.O. Box 2804, Cedar Rapids, Iowa 52406-2804; Mr. William J. Bribriesco, William Bribriesco & Associates, 2407 18th Street, Suite 202, Bettendorf, Iowa 52722; Mr. David Phipps and Ms. Jaki Samuelson,

Attorneys at Law, 317 6th Avenue, Suite 1200, Des Moines, Iowa 50309 on the 21th day of December, 1994.

/s/ Michelle Adams

IN THE SUPREME COURT OF IOWA

No. 93-855

Chickasaw County Nos. CL27-11-91, CL14-4-88

ORDER

(Filed Jan. 04, 1995)

M. HAROLD EZZONE,
Plaintiff-Appellant,

PATRICIA L. LaROSA,
Intervenor-Appellant,

vs.

RONALD RICCARDI, et al.,
Defendants-Appellees.

PATRICIA LaROSA,
Plaintiff-Appellant,

vs.

RONALD RICCARDI, et al.,
Defendants-Appellees.

The court, sitting en banc, has considered the motions filed by plaintiffs following this court's order overruling all petitions for rehearing.

Among other things plaintiffs ask directions concerning whether a new trial (in the absence of remittitur) would be unconditional, or would be limited to the issue of punitive damages. The rule is that, in the absence of explicit directions to the contrary, an order for a new trial is an order for a complete new trial on all issues, as an original case. *Householder v. Town of Clayton*, 221 N.W.2d 488, 493 (Iowa 1974); *Mundy v. Olds*, 254 Iowa 1095, 1106,

120 N.W.2d 469, 476 (1963). Any new trial will thus be on all issues and as an original case.

All pending motions are overruled.

Dated this 4th day of January, 1995.

THE SUPREME COURT OF IOWA

By /s/ David Harris
David Harris, Justice

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IN THE SUPREME COURT OF IOWA

S. Ct. No. 93-855

M. HAROLD EZZONE, and	Plaintiff-Appellant/ Cross Appellee,
PATRICIA L. LAROSA, vs.	Intervenor-Appellant/ Cross Appellee,
RONALD RICCARDI, a/k/a "RICK" RICCARDI, and	Defendant-Appellee,
WILLIS M. HANSEN, DENNIS B. HANSEN, PRECISION OF NEW HAMPTON, INC., and STATE BANK OF LAWLER,	Defendants-Appellees/ Cross Appellants.
PATRICIA L. LAROSA, vs.	Plaintiff-Appellant/ Cross Appellee,
RONALD RICCARDI, a/k/a "RICK" RICCARDI, and	Defendant-Appellee,
WILLIS M. HANSEN, DENNIS B. HANSEN, PRECISION OF NEW HAMPTON, INC., and STATE BANK OF LAWLER,	Defendants-Appellees/ Cross Appellants.

APPEAL FROM THE IOWA DISTRICT
COURT FOR CHICKASAW COUNTY
Hon. James C. Bauch, Judge

SECOND MOTION TO CLARIFY
AND/OR TO RECONSIDER

(Filed Jan. 04, 1995)

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CERTIFICATE OF SERVICE

The undersigned certifies that 18 copies of the foregoing Second Motion to Clarify and/or Reconsider will be deposited in the U.S. Mail, in a postal depository in Algona, Iowa, postage prepaid, in an envelope addressed to the Clerk of the Supreme Court of Iowa on the 3rd of January 1995. The undersigned further certifies that 2 copies of the foregoing Second Motion to Clarify and/or Reconsider will be deposited in the U.S. Mail, in a postal depository in Algona, Iowa, postage prepaid, in envelopes addressed to each of the following counsel, on the 3rd day of January, 1995: Mr. Andrew F. Van Der Maaten, Anderson, Wilmarth & Van Der Maaten, Attorneys at Law, P.O. Box 450, Decorah, Iowa 52101; Mr. Mark McCormick and Ms. Margaret Callaghan, Belin, Harris, Helmick, Lamson & McCormick, Attorneys at Law, 2000 Financial Center, Des Moines, Iowa 50309-3989; Mr. Donald G. Thompson, Mr. Dean A. Spina, and Mr. David E. Mullin, Bradley & Riley, Attorneys at Law, P.O. Box 2804, Cedar Rapids, Iowa 52406-2804; Mr. William J. Bribriesco, William Bribriesco & Associates, 2407 18th Street, Suite 202, Bettendorf, Iowa 52722; Mr. David Phipps and Ms. Jaki Samuelson, Attorneys at Law, 317 6th Avenue, Suite 1200, Des Moines, Iowa 50309.

/s/ Mark S. Soldat

MOTION

Pursuant to Rules 22 and 27, I.R.A.P., M. Harold Ezzone, ("*Ezzone*"), by counsel moves this court *en banc* to clarify its 9/21/94 opinion, as modified by the 12/15/94 order, with respect to the following points:

(A) On remand, may a new jury award more in punitive damages against the Hansens than those found "to be greatly excessive" and "out of proportion to any amount needed, in addition to compensatory awards, for deterrence purposes. . . . " and if so, under what circumstances?

(B) Pursuant to this court's disclosure standards, as reflected in its *Larew* opinion, what evidence was controlling in the decision to remit the punitive damages awarded to Ezzone by 90%-99.45%?

(c) Pursuant to this court's disclosure standards, as reflected in its *Larew* opinion, what evidence was controlling in the finding that Ezzone's "participation ['in the conduct complained of'] was provoking as well as provoked . . . "?

To the extent that clarification is not or cannot be given on those points, Ezzone by counsel moves, (or alternately petitions), this court *en banc* to reconsider (and/or rehear) the punitive damage decision to remit.

WHEREFORE, it is prayed that this motion, (and/or petition), be granted.

BRIEF

Introduction (*Larew Standard*). In the 9/21/94 opinion, p. 26, this court reduced the punitive damages jury award to Ezzone as follows: against Willis Hansen, $180,000 to $18,000, 90%; against Dennis Hansen, $25,672 to $2,500, 90.3%; against the State Bank, $180,000 to $1,000, 99.45%.

In this same opinion, pp. 24-27, the court did not identify any evidence which mandated these reductions. Instead, it identified, p. 26, the factors it thought relevant, *i.e.* "extent and nature of the outrageous conduct, the amount necessary for future deterrence . . . deference to the relationship between the punitive award and plaintiff's injury, as reflected in any award for compensatory damages. . . . [and] all circumstances surrounding the conduct and relationship between the parties. . . . [including] [a]ny provocation of the conduct by plaintiff . . . " It also concluded, p. 26, "for punitive damages purposes, that his [Ezzone's] participation ['in the conduct complained of'] was provoking as well as provoked. . . . "

When Ezzone filed his 10/7/94 rehearing petition, his primary articulated concerns were with the application of a new reduction rule previously-unaddressed by the litigants and with the lack of evidentiary justification for reductions in derogation of a jury's verdict. Indeed, in his 10/10/94 reply, he spent considerable effort demonstrating and annotating how the record evidence did not support the reductions made.

In its 12/15/94 order, however, this court afforded no further identification of the supporting evidence or explanation of how it viewed such evidence as justifying the

reductions made. Still, it modified the reductions, so that they became optional if Ezzone instead chose a new trial. Because of this very choice, newly given, it has become imperative that Ezzone be given an explanation of how and why the reductions were made and what effect they have on further fact-finding. Without such an explanation, he is denied an opportunity to make an informed and intelligent choice between accepting the remitted amounts and triggering a new trial.

Moreover, the explanation he seeks is no more than this court normally requires of trial courts who grant remittitur and of itself in most of its opinions:

> This raises the question of what standards should be applied in determining whether there has been an abuse of discretion by the trial court in ordering a remittitur or a new trial. Our cases are not enlightening on this point. We have sometimes seemed to say that the trial court need not give any reason for thinking the verdict unsupported by the evidence; and again, *we have pointed out features in the proof which were thought to justify an interference* with the award. It is our conclusion that *something should be shown which goes beyond the mere unsupported statement* of the trial court *that the verdict is inadequate or excessive.* Its discretion *should not rest solely upon its own opinion* of the evidence *unless something appears in the record which justifies it. Larew v. Iowa State Highway Commission,* 257 Iowa 64, ___, 130 N.W.2d 688, 690 (1964), *[emph. supp.].*

Indeed, as emphasized above, it has been quite typical of this court to go into lengthy and detailed discussions of the damages evidence, thereby explaining exactly

wherein the evidence was sufficient or insufficient to support the damage verdicts. *E.g., Von Tersch v. Ahrendsen,* 251 Iowa 115, ___, 99 N.W.2d 287, 291-292 (1959); *Ferris v. Riley,* 251 Iowa 400, ___, 101 N.W.2d 176, 183-184 (Iowa 1960); *Fredrickson v. Heline,* 252 Iowa 92, ___, 106 N.W.2d 74, 76-77 (1960); *Nelson v. Iowa State Highway Commission,* 253 Iowa 1248, ___, 115 N.W.2d 695, 698-699 (1962); *Grant v. Thomas,* 254 Iowa 581, ___, 118 N.W.2d 545, 547-548 (1962); *Brophy v. Iowa-Illinois Gas and Electric Company,* 254 Iowa 895, ___, 119 N.W.2d 865, 867 (1963); *Mazur v. Grantham,* 255 Iowa 1292, ___, 125 N.W.2d 807, 812-814 (1964); *Hurtig v. Bjork,* 258 Iowa 155, ___, 138 N.W.2d 62, 64-67 (1965); *Schmitt v. Jenkins Truck Lines, Inc.,* 170 N.W.2d 632, 661-665 (1969); *Ives v. Swift & Company,* 183 N.W.2d 172, 177-178 (Iowa 1971).

Whether The Future Jury Verdict May Exceed The Remittitur Amount. Understanding the process by which the court reached the remitted amounts is important to Ezzone. Obviously, if it was a fact-finding process on the entire evidentiary record, especially one in the light most favorable to the verdicts, then there would seem to be little point in electing a new trial. That is, even if on a substantially-similar record he were successful in convincing a second jury to award more than the remitted amounts, why would this court not make the same in-the-light-most-favorable findings on a substantially-similar record in a third appeal and reduce the punitive damages again?

In its 9/21/94 opinion, the court revealed nothing of the process employed, except at one juncture. At that juncture, p. 26, it seemed to imply that it found a fact related to the provocation factor differently than the jury

had found it: "Although Ezzone convinced the jury he was manipulated by Riccardi into undertaking his deceitful conduct, [presumably against LaRosa, *see*, p. 24], *we think* the record clear, for punitive damages purposes, that his participation was provoking as well as provoked." (*emph. supp.*) Obviously, this sounds like *de novo* fact-finding.

In that regard, there is some authority for the proposition that for a trial court, "[t]he question of whether the verdict was excessive was not one of law, but was a question of fact under the record made . . . " *In Re Hollis' Estate*, 235 Iowa 753, ___, 16 N.W.2d 599, 602 (1944). In this authority, there was even a suggestion that if there is not new evidence in the new trial, there cannot be a jury increase in the remitted damage amounts:

> On a retrial, if there be one, the evidence may be different. In such case, judgment may be had in accordance therewith, and the trial court will not be bound by its former action, [of remittitur], and our approval thereof. *Id.*, N.W.2d at 604.

On the other hand, there is also considerable of [sic] authority that in the remittitur process, the court cannot permit its view of the evidence to compete with the jury's, and in fact, must view in the light most favorable only the evidence supportive of the jury's verdict . *E.g*, *Grant v. Thomas*, 254 Iowa 581, ___, 118 N.W.2d 545, 547 (1962), ["The mere fact that the court might have reached a lesser award does not justify the substitution of its judgment for that of the jury."]; *Moser v. Brown*, 249 N.W.2d 612, 616 (Iowa 1977), [Harris, J., "we view the evidence in the light most favorable to the verdict and

consider only favorable evidence whether contradicted or not."]; *Fredrickson v. Heline*, 252 Iowa 92, ___, 106 N.W.2nd 74, 76 (1960), ["the evidence (is taken) in the aspect most favorable to the plaintiff it will reasonably bear"]. In this kind of approach, the court only reviews the record to determine if there is evidence which a reasonable person would find adequate to reach the decisions the jury reached in its verdicts: "In passing on the alleged excessiveness of damages we need determine only whether there was substantial evidence to support the verdict." *Clarey v. K-Products, Inc.*, 514 N.W.2d 900, 903 (Iowa 1994).

Ultimately, however, whether the appellate review is more akin to *de novo* fact-finding or to judicial review of agency action, it still seems like the result should be the same from the remittitur option standpoint. If there was not in the first appeal's record enough evidence, (substantial or otherwise), to persuade the appellate court that more than the remitted amount could be justified and adjudged, how then could a higher verdict on a like record from a second jury ever be justified and adjudged?

Nonetheless, notwithstanding that question, there does seem to be authority that if the verdict of the second jury tends to imitate the verdict of the first jury, then the appellate court will not repeat remittitur or grant new trial on appeal from the second verdict. *Larew v. Iowa State Highway Commission*, 257 Iowa 64, ___, 130 N.W.2d 688, 691 (1964); *Jones v. Iowa State Highway Commission*, 185 N.W.2d 746, 752 (Iowa 1971). Under this authority, the fact-finding of excessiveness becomes more of a judicial impression of excessiveness, (which somehow avoids fact-finding *per se*), and the remittitur becomes more of a

judicial estimate of an appropriate amount for the plaintiff to consider as a compromise. If, however, the second jury ratifies the wisdom of the first jury, both the impression and the estimate give way to the jury fact-finding, twice rendered.

With these competing concepts in mind, the confusion and inconsistency of the remittitur rule once again surfaces. It does not make sense to give a choice which is not a choice, that is, to accept the remitted amount or to accept no more than the remitted amount on a new trial. It also does not make sense to say that one jury's verdict is unsupported by the evidence "for punitive damage purposes", but that if a second jury renders a similar verdict on the same evidence, judgment for it may be affirmed. Instead, it makes sense to invade the province of the jury fact-finding only if that fact-finding process itself was contaminated by an extraneous force, such as palpable passion and prejudice, (not so found by the trial court here), and then only for the purpose of permitting an uncontaminated jury, not the court, to find the damage facts anew. *See*, Ezzone's 12/29/94 motion for ruling and to reconsider.

Be that as it may, in the absence of this court reconsidering and rescinding its new remittitur rule, (either before or after modification), it is only fair that this court at least clarify whether there is any value in Ezzone opting for a new trial. Otherwise, given the confusion and inconsistency, he unfairly is made to guess, (at both his and judicial expense), whether the choice of a new trial actually will permit him to recover more than the remitted amounts.

What Was Controlling In the 90%-99.45% Evidentiary Insufficiency Found. Clearly, if the remittitur option was granted on traditional grounds, than it must have been granted because of some insufficiency in the evidence, (substantiality or otherwise), to support the punitive damages verdict:

> In considering the size of verdicts we have repeatedly referred to passion and prejudice, shock the conscience, failure to administer substantial justice, the rule of fair compensation, and lack of support in the evidence. *Cits. It seems fundamental the most important of these is support in the evidence.* If the verdict has supports in the evidence the others will hardly arise, if it lacks support they may all arise. *The real question in most cases* and here, *is the amount and sufficiency of evidence to support the award made.* Certainly where the verdict is within a reasonable range as indicated by the evidence the courts should not interfere with what is primarily a jury question. *Mazur v. Grantham,* 255 Iowa 1292, ___, 125 N.W.2d 807, 812-814 (1964)., [*emph. supp.*]

Equally clearly, this evidentiary insufficiency itself must have been clear, *e.g.*:

> The allowance of damages is primarily for the jury and we should not substitute our judgment for theirs unless it *clearly* appears the verdict is the result of passion or prejudice or is unconscionable or *clearly* not warranted by the evidence. *Von Tersch v. Ahrendsen,* 251 Iowa 115, ___, 99 N.W.2d 292 (1959), [*emph. supp.*].

* * * *

> Our function to interfere should be exercised sparingly, and only when the record is *clear* the jury has not fairly responded to the evidence and instructions. *Nelson v. Iowa State Highway Commission*, 253 Iowa 1248, ___, 115 N.W.2d 695, 698 (1962), [*emph. supp.*].
>
> * * * *
>
> The allowance of damages is primarily for the jury and the court should not interfere unless it *clearly* appears the verdict was the result of passion or prejudice, is unconscionable, not warranted by the evidence or fails to administer substantial justice. The mere fact the court might have reached a lesser award does not justify the substitution of it [sic] judgment for that of the jury. *Grant v. Thomas*, 254 Iowa 581, ___, 118 N.W.2d 545, 547 (1962), [*emph. supp.*].

For the purposes of evaluating the efficacy of electing a new trial, however, it is not at all "clear" from the 9/21/94 opinion wherein the evidence was insufficient to support the 90%-99.45% reductions of the jury's punitive damages verdicts.

It also is not "clear" from the guidance given in this court's past decisions, none of which resulted in a 90%-99.45% remittitur and most of which contained detailed discussions of the evidentiary deficiencies dictating remittitur. *In Re Hollis' Estate*, 235 Iowa 753, ___, 16 N.W.2d 599, 600, 603 (1944), [$900 remitted to $500, **55.5%** reduction]; *Curnett v. Wolf*, 244 Iowa 683, ___, 57 N.W.2d 915, 919 (1953), [$7,500 remitted to $4,000, **40%** reduction]; *Soreide v. Vilas & Company*, 247 Iowa 1153, ___, 78 N.W.2d 41, 49-50 (1956), [$50,000 remitted to $37,500, **25%** reduction]; *Jesse v. Wemer and Wemer Company*, 248 Iowa

1002, ___, 82 N.W.2d 82, 91 (1957), [12,366.29 remitted to $7,500, **39%** reduction]; *Christensen v. Des Moines Still College of Osteopathy*, 248 Iowa 810, ___, 82 N.W.2d 741, 747 (1957), [$11,600 remitted to $8,500, **26.7%** reduction]; *Heerde v. Kinkaid* 249 Iowa 85, ___, 85 N.W.2d 908, 912 (1957), [$2,500 remitted to $1,504, **37.8%** reduction]; *Jurgens v. Davenport Rock Island and Northwestern Railway Company*, 249 Iowa 711, ___, 88 N.W.2d 797, 799, 805 (1958), [$12,124.38 remitted to $8,624.38, **28.9%** reduction); *Stortenbecker v. Iowa Power and Light Company*, 250 Iowa 1073, ___, 96 N.W.2d 468, 474 (1959), [$8,372 remitted to $5,372, **35.8%** reduction]; *Ferris v. Riley*, 251 Iowa 400, ___, 101 N.W.2d 176, 177, 184 (1960), [$80,000 remitted to $55,000, **31.25%** reduction]; *Haas v. Evening Democrat Company*, 252 Iowa 517, ___, 107 N.W.2d 444, 454 (1961), [$35,000 remitted to $6,000, **71.5%** reduction]; *Resom v. Northwestern States Portland Cement Company*, 252 Iowa 564, ___, 107 N.W.2d 559, 566 (1961), [$20,000 remitted to $14,353, **28%** reduction]; *Luse v. Sioux City*, 253 Iowa 350,, ___, 112 N.W.2d 314, 317 (1961), [$2,000 remitted to $1,780, **11%** reduction]; *Miller v. Town of Ankeny*, 253 Iowa 1055, ___, 114 N.W.2d 910, 912, 915 (1962), [$4,700 remitted to $3,000, **30%** reduction]; *Railsbeck v. Buesch*, 253 Iowa 1064, ___, 114 N.W.2d 916, 920 (1962), [$17,500 remitted to $13,215.46, **24.5%** reduction]; *Tedrow v. Fort Des Moines Community Services, Inc.*, 254 Iowa 193, ___, 117 N.W.2d 62, 68 (1962), [$22,500 remitted to $15,000, **33%** reduction]; *Grant v. Thomas*, 254 Iowa 581, ___, 118 N.W.2d 545, 548 (1963), [$15,000 remitted to $11,000, **27%** reduction]; *Engman v. City of Des Moines*, 255 Iowa 1039, ___, 125 N.W.2d 235, 236, 240-241 (1963), [$25,000 remitted to $19,000, **24.6%** reduction]; *Castner v.*

Wright, 256 Iowa 638, ___, 127 N.W.2d 583, 594 (1964), [$45,000 remitted to $12,500, **72%** reduction]; *Larew v. Iowa State Highway Commission*, 257 Iowa 64, ___, 130 N.W.2d 688, 689 (1964), [$13,000 remitted to $6,500, **50%** reduction]; *Hurtig v. Bjork*, 258 Iowa 155, ___, 138 N.W.2d 62, 63 (1965), [$28,000 remitted to $16,000, **42.85%** reduction]; *Giarranto v. Weitz Company*, 259 Iowa 1292, ___, 147 N.W.2d 824, 826, 837 (1967), [$75,000 remitted to $50,000, **33%** reduction]; *Bates v. Quality Ready-Mix Co.*, 154 N.W.2d 882, 889 (Iowa 1967), [$5,300 remitted to $4,960, **16%** reduction]; *Hall v. Wright*, 261 Iowa 758, 774, 156 N.W.2d 661, 670-671 (1968), [$25,000 remitted to $17,400, **30.4%** reduction; *Oldsen v. Jarvis*, 159 N.W.2d 431, 435 (Iowa 1968), [$15,000 remitted to $10,000, **33%** reduction; *Miller v. Young*, 168 N.W.2d 45, 53 (Iowa 1969), [$14,484.19 remitted to $8,763.07, **39.5%** reduction; $10,000 remitted to 58,000, **20%** reduction]; *Stom v. City of Council Bluffs*, 189 N.W.2d 522, 530 (Iowa 1971), [$18,000 remitted to $10,000, **44.4%** reduction]; *Larsen v. United Federal Savings and Loan Association of Des Moines*, 300 N.W.2d 281,283, 289 (Iowa 1981), [$28,000 remitted to $20,000, **28.6%** reduction]; *Montgomery Properties Corporation v. Economy Farms Corporation*, 305 N.W.2d 470, 478 (Iowa 1981), [$35,000 remitted to $17,644, **49.6%** reduction]; *Bossuyt v. Osage Farmers National Bank*, 360 N.W.2d 769, 776 (Iowa 1985), [$30,000 remitted to $8,000, **73.3%** reduction]; *Kansas City Life Insurance Company v. Hillinger*, 459 N.W.2d 889, 898 (Iowa App. 1990), [$28,000 remitted to $25,632, **8.5%** reduction]. Additionally, for those opinions dealing with remittitur of unliquidated intangible damages, the

range of reduction typically was in the 25%-45% range.[1] *Id.*

Because in its 9/21/94 opinion, p. 26, the court placed some emphasis on the punitive/compensatory damage relationship, that factor also was examined in an attempt to comprehend the basis for the 90%-99.45% remittitur. For that factor, there is "no exact rule for computing the amount of exemplary damages . . . " and [t]here is no set mathematical ratio between actual and exemplary damages." *Northrup v. Miles Homes, Inc. Of Iowa*, 204 N.W.2d 850, 861 (Iowa 1973). Even so, ratios in which the punitive damages were 2.8 to 6.4 times greater than compensatory damages typically have been approved by this court.[2] *Id.; see also, Kelly v. Iowa State*

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[1] Furthermore, 1971 was the last year in which this court felt justified in invading the jury's province by remitting unliquidated intangible damages. *See*, Ezzone's 12/29/94 motion for ruling and to reconsider, pp. 11-21.

[2] In one recent case, a ratio of $120 in compensatory damages to $18,600 in punitive damages was approved under the following rationale:

> We have stated that punitive damages must be reasonably related to actual damages. *Cits.* Recent cases, however, have held that punitive damages may be awarded even if actual damages were shown but never awarded. *Cits.* These cases show that *our primary focus in review of a punitive damage award is the relationship between the punitive damage award and the wrongful conduct of the offending party.*
>
> An inflexible mathematical *ratio which focuses on the plaintiff's injuries* rather than the wrongful acts of the defendant *fails to accomplish the policy objectives of punishment and deterrence and has been rejected in several jurisdictions. . . .*

Education Association, 372 N.W.2d 288, 300 (Iowa App. 1985), [damage awards of $75,000, compensatory, $100,000, punitive, approved] Here, the jury verdicts for compensatory damages, ($350,000), and punitive damages, ($385,672), were approximately equal before the reduction to $21,500 made the compensatory damages 16.3 times greater than the punitive damages.

Moreover, the reduced amount did not meet the following criterion: "To be effective in this purpose the exemplary damages must be *relatively large." Northrup supra, (emph. supp.); accord, Grefe v. Ross*, 231 N.W.2d 863, 868-869 (Iowa 1975). This was especially so when the Hansens' financial worths were considered as a factor by the jury, (as was quite permissible, although not so noted a factor in the 9/21/94 opinion):

> Thomas further argues the awards of punitive damages were excessive and that they were the result of passion and prejudice on the part of the jury because the jury received evidence of personal worth. We disagree. Evidence of a defendant's financial worth is one relevant factor for the jury to consider when setting a punitive damage award. *Lara v. Thomas*, 512 N.W.2d 777, 783 (Iowa 1994).

> In determining whether punitive damages are so excessive that they demonstrate passion and prejudice on the part of the jury, we will consider *whether the punitive damage award is reasonably related to the malicious conduct of the defendant* which resulted in actual injury or damage to the plaintiff. *Ryan v. Arneson*, 422 N.W.2d 491, 496 (Iowa 1988), [*emph. supp.*].

Here, the Hansens stipulated to the net worth of $815,175 to Dennis Hansen. $7,623,000 to the State Bank, and $6,319,086 to Willis Hansen. (10/27/92 tr. trans., pp. 1879-1880.) Under the jury verdicts, punitive damages were the following percentages of net worths: 3%, Dennis Hansen; 2.4%, State Bank; 2.8%, Willis Hansen. Accordingly, it is hard to appreciate how these percentages, representing mere drops in the bucket, were deemed excessive, *i.e.* not constituting sufficient evidence of an amount necessary to punish and deter, or conversely, constituting sufficient evidence to support the conclusion that they were "out of proportion to any amount needed- . . . . for deterrence purposes". (9/21/94 opin., p. 26.) *See, Poulsen v. Russell,* 300 N.W.2d 289, 295-296 (Iowa 1981), [By close analogy to Ezzone's case, a $200,000 punitive damage award, in conjunction with a $83,545 compensatory damage award, against a wrongdoer, who breached his fiduciary duty to the victim, thereby extinguishing the victim's business, and who had a $6,000,000 net worth, was well within jury's discretion].

As a corollary, it is even harder to appreciate how the following "relatively" minuscule percentages under this court's reduction are appropriate as deterrents: 0.3%, Dennis Hansen; 0.013%, State Bank; 0.29%, Willis Hansen. Even if somehow the joint and several compensatory damages were added duplicatively[3] to these reduced

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[3] These percentages were figured "duplicatively" because the $350,000 compensatory damages were added thrice, once to each defendant's reduced punitive damages, even though all three defendants were liable for the $350,000 only once. If instead the $350,000 were added to the total punitive damages of $21,500.00 and divided by the total net worth, then the overall percentage reduction of net worth would be 2.5%.

punitive damages, it still is difficult to appreciate how the resulting percentages of net worth diminishments, (except perhaps the first one), represent deterrents: 43%, Dennis Hansen; 4.6%, State Bank; 5.8%, Willis Hansen.

Similarly, based upon precedent and the 9/21/94 opinion, p. 26, it is and will be difficult on remand to determine what evidence demonstrated that the jury's verdict was excessive in light "of the extent and nature of the outrageous conduct . . . " of the Hansens. This court has affirmed the verdicts which found as fact that the Hansens committed one intentional tort and participated in two intentional torts, the same causing Ezzone to be deprived of all his worldly possessions, (in 1986-87, right down to today because the Hansens have litigated, rather than restituted). Further, in the light most favorable, the Hansens did nothing to help Ezzone recover those possessions, and in fact engaged in a vicious coverup to prevent him from doing so. In the light most favorable, they also told untruths, both inside and outside the courtroom. In the light most favorable, they committed these intentional torts out of avarice for Ezzone's unique manufacturing invention, and in doing so, they left competing local banks, competing local insurance agents, and the town of New Hampton high and dry. Other than from the mysterious provocation of their willful and wanton conduct attributed to Ezzone, *infra*, there simply does not seem to be anything in the record to suggest that the Hansens should not be severely punished in a "relatively large" amount for their misconduct.[4] *See Hockenberg's*

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[4] Indeed, a review of the briefs, petitions, and resistances filed during this appeal by the Hansens discloses that they

Equipment Company v. Hockenberg's Equipment & Supply Company of Des Moines, 510 N.W.2d 153, 156-157 (Iowa), [award of $5,000 punitive damages, in conjunction with nominal $1 compensatory damages, for "defendant's "persistent course of conduct" in committing an intentional tort].

What to Do About The Uncertainty and the Inconsistency of the Provocation Found. On remand, the matter which probably is in need of the most clarification is the new punitive damages factor of relationship between the parties, specifically including victim provocation. This need arises because of the absence of such a factor in section 668.1, Code of Iowa, and in Iowa Civil Jury Instructions Nos. 210.1-210.4, (in which all the other factors identified by the court are covered). This need also arises because of a dearth of judicial precedent.

Indeed, to the extent that a factor of the parties' relationship or of the victim's provocation attempts to compare or consider the conduct of the victim to or as mitigation of the willful and wanton conduct of the wrongdoer, (or at least of the resulting punishment and deterrence), it seems irreconcilable with Iowa precedent:

> Defendants further contend that assumption of risk is a complete defense to a claim for

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seldom, if at all, defended their own conduct, or even more importantly, showed any repentance for their wrongdoing. Instead, they defended by the misdirection of painting Ezzone as some sort of undeserving victim. Notably, this court has not expressly condoned such a defense, and at least in criminal sentencing, usually condones the imposition of a heavier sentence on the unrepentant.

> punitive damages. Defendants' argument is misplaced, however, for two reasons. First, there is no legal basis under our past cases for finding a separate defense to a claim for punitive damages. Punitive damages are merely incidental to the main cause of action. *Cit.* Defendants cannot assert the defense of assumption of risk as to punitive damages when such defense is not applicable to the underlying cause of action from which the claim for punitive damages is derived. . . .
>
> Secondly, the great weight of the jurisdictions that have adopted the comparative negligence doctrine, and that have considered whether that doctrine requires the reduction of punitive damages by the percentage of plaintiff's negligence, have refused to so reduce the punitive damage award. Cits.
>
> Because in Iowa assumption of risk is considered in its "secondary meaning" to be an expression of plaintiff's contributory negligence, the rule in the above cited cases from other jurisdictions would apply equally to a claimed defense of assumption of risk. Thus, assumption of risk is not a defense to punitive damages. *Campbell v. Van Roekel*, 347 N.W.2d 406, 410 (Iowa 1984).

Here, of course, the claims of intentional torts precluded any comparative negligence or provocation defenses to the "underlying causes of action", and therefore also to the "incidental" punitive damages claims. Moreover, as stated earlier, "the primary focus" was on "the relationship between the punitive damage award and the wrongful conduct of the offending party. . . . " (not on the

relationship between the victim and the "offending party"). *Arneson, supra,* fn. 2, p. 12.

The need to clarify is further prompted by seeming inconsistency in the 9/21/94 opinion itself. That is, at p. 26, the court defined "provocation to include participation in the conduct complained of." Yet, the "conduct" of which Ezzone "complained" was: (a) the Hansens' aiding, abetting, and conspiring with Riccardi to breach the confidential relationship between Ezzone and Riccardi, (the theory upon which the judgment was posited); (b) the Hansens' intentional interference with the contractual relationship between Ezzone, as a stockholder, and the corporation, PTCI; and (c) the Hansens' aiding, abetting, and conspiring with Riccardi to convert Ezzone's ownership interest in his business, PTCI. Especially, if "the evidence [is taken] in the aspect most favorable to the plaintiff [Ezzone] it will reasonably bear. . . . " and competing evidence disregarded, *Fredrickson, supra,* N.W.2d at 76, then there is no record evidence or fact which indicated that he participated in the above conduct against himself by the Hansens. To the contrary, the "most favorable" evidence was that Ezzone did not know that Riccardi was breaching his trust or stealing his business, let alone that Ezzone knowingly participated in this misconduct.

Quite distinguishably, the only Ezzone-participatory misconduct conceivably shown in the record was in the separate-scheme conduct by Riccardi and the Hansens against LaRosa, (of which LaRosa "complained" separately). This, however, was not "the conduct he [Ezzone] complained of. . . . " Moreover, since there was evidence in the record, (taken "in the aspect most favorable"), that

the Hansens independently knew all about the Riccardi scheme against LaRosa and yet still participated in it, as well as the scheme against Ezzone, (unknown to Ezzone), it is and will be difficult on remand to appreciate just how the Hansens could be viewed as having been provoked by the victim Ezzone into their willful and wanton victimization of Ezzone. That is, it will be difficult to appreciate, unless it is held that somehow the mere act of becoming a victim, (an act not unlike assumption of the risk), constitutes participation in the "conduct complained of".

The point then is this. Ezzone does not understand how he could have been found to have participated either in the breach of his confidential relationship with Riccardi or in the Hansen's aiding, abetting, or conspiring to breach that confidential relationship. He also does not know how he could have been found to have provoked the Hansens into doing him wrong, or for that matter, what the Hansens' impetus for doing intentional, willful, and wanton wrong has to do with their punishment in any case.

He, therefore, doubts that the trial court will know on remand what constitutes provocation, either from the opinion, past precedent, or the "primary focus" of punitive damages. Yet, the trial court will have to rule on materiality and relevancy objections related to the provocation defense and ultimately will have to instruct the jury on the provocation factor. How can it do so without clarification? For that matter, how can Ezzone evaluate his new trial option when he does not know what evidence had a bearing on this factor or how much bearing the factor had on the 90%-99.45% reduction? Resultingly,

clarification of this factor is well warranted and extremely needed.

Conclusion. Given past appellate review practice, these requests for clarification are reasonable and necessary for remand guidance. That is why they have been made. However, it is not overlooked that the reasons expressed for clarification also give rise to reasons for reconsideration of just how pragmatic and conceptually consistent the new modified rule is when it has to be applied at the trial court level. Therefore, Ezzone requests both clarification and reconsideration.

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ATTORNEYS FOR M. HAROLD EZZONE

IN THE SUPREME COURT OF IOWA

No. 93-855

Chickasaw County Nos. CL27-11-91, CL14-4-88

ORDER

(Filed Jan. 11, 1995)

M. HAROLD EZZONE,
Plaintiff-Appellant,

PATRICIA L. LaROSA,
Intervenor-Appellant,

vs.

RONALD RICCARDI, et al.,
Defendants-Appellees.

PATRICIA LaROSA,
Plaintiff-Appellant,

vs.

RONALD RICCARDI, et al.,
Defendants-Appellees.

The court, acting en banc, denies any motions now pending and not previously ruled upon.

Dated this 11th day of January, 1995.

THE SUPREME COURT OF IOWA

By /s/ David Harris
David Harris, Justice

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IN THE IOWA DISTRICT COURT
IN AND FOR CHICKASAW COUNTY

M. HAROLD EZZONE,
Plaintiff,
PATRICIA L. LaROSA,
Intervenor,
v.
RONALD RICCARDI, et al.,
Defendants.

PATRICIA L. LaROSA,
Plaintiff,
v.
RONALD RICCARDI, et al.,
Defendants.

LAW NO. CL
14-4-88 61-94
CL 27-11-91
62-206

REMITTITUR FILED BY PATRICIA L. LaROSA

(Filed Jan. 26, 1995)

Pursuant to the Order of the Supreme Court of Iowa filed December 15, 1994, pp. 26-27, Patricia L. LaRosa, by counsel, accepts in lieu of a new trial, the remitted amounts of punitive damages as follows:

$90,000 against Willis Hansen
$ 6,000 against Dennis Hansen
$ 1,000 against the State Bank of Lawler

In filing this remittitur, Patricia L. LaRosa notes that the Iowa Supreme Court left her no choice but to accept the remitted amounts of punitive damages:

1. At pages 26-27 of its December 15, 1994, Order, the Iowa Supreme Court stated:

> LaRosa's conduct was not subject to the same criticism as Ezzone's, but the record does clearly show she backed Ezzone's misrepresentations about the business to the Hansen defendants. In addition, we think the punitive damages awarded to her, as was the case with Ezzone's, are out of proportion to any amount needed for deterrence purposes.

In a Motion to Reconsider and/or Rehear served on M. Harold Ezzone on December 21, 1994, and incorporated by reference by LaRosa in a Motion for Reconsideration and/or Rehearing served on the same date, LaRosa and Ezzone characterized the above finding as appellate fact finding. The Iowa Supreme Court did not, in any of its orders after December 21, 1994, indicate that this characterization was inaccurate. In a Second Motion to Clarify, LaRosa moved the Iowa Supreme Court to clarify its December 15, 1994, Order so that she could make an intelligent choice on the remittitur issue. Specifically, she asked whether, given the appellate fact finding, she could recover any more than the remitted amounts of punitive damages if she refused to file a remittitur and instead chose to proceed with a new trial. Since the Iowa Supreme Court declined to clarify its opinion, LaRosa assumes that if she cannot present different evidence regarding punitive damages at a new trial (which she cannot, at least without further clarification, *see* ¶ 3, *infra*), then upon further appellate review, any punitive damages greater than the remitted amounts will continue to be found by the appellate court to be "greatly excessive" and "out of proportion to any amount needed

for deterrence purposes." Under these circumstances, the choice offered LaRosa by the Iowa Supreme Court between remittitur and new trial is no choice at all.

2. After the Iowa Supreme Court filed its December 15, 1994, Order, LaRosa also sought clarification whether a new trial would be limited to the issue of the amount of punitive damages to be found, in light of the fact that the Iowa Supreme Court had affirmed on issues of liability, and compensatory damages, and the only issue raised by the Defendants was on the questions of punitive damages: whether there was sufficient evidence to submit the punitive damage claim to the jury. On January 4, 1995, the Iowa Supreme Court entered an order stating that "Any new trial will thus be on all issues and as an original case." Requiring LaRosa to accept the remittitur of punitive damages, or retry all issues, after successfully presenting her case to a jury and then successfully defending that judgment, except on the sole issue of the amount of punitive damages, an issue not even raised by the Defendants on appeal, does not provide LaRosa with a true choice.

3. After the Iowa Supreme Court filed its December 15, 1994, Order, LaRosa sought further clarification and joined in a motion served by Ezzone on January 3, 1995, in which she and Ezzone sought further clarification of the evidence and rationale upon which the Iowa Supreme Court based its conclusions regarding the excessiveness of the punitive damage awards and the relationship of those punitive damage awards to the compensatory damage awards, specifically including what the Iowa Supreme Court meant by the new punitive damage factor of provocation. She did so because she needed to evaluate

whether there was anything new or different that she could present at a new trial to produce a punitive damage award that would not be reduced on appeal. On January 11, 1995, the Iowa Supreme Court entered an order refusing to clarify, completing the process of depriving LaRosa of any meaningful choice between accepting remittitur and opting for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Cedar Rapids, Iowa on the 24th day of January 1995

/s/ Denzel L. Coberly

IN THE IOWA DISTRICT COURT
IN AND FOR CHICKASAW COUNTY

M. HAROLD EZZONE, Plaintiff, and PATRICIA L. LaROSA, Intervenor, vs. RONALD RICCARDI, *et al.*, Defendants.	Law No. CL 14-4-88 61-94 REMITTITUR BY M. HAROLD EZZONE Law No. CL 27-11-91 62-206 (Filed Jan. 26, 1995)
PATRICIA LaROSA, Plaintiff, vs. RONALD RICCARDI, *et al.*, Defendants.	

Pursuant to the amended opinion of the Supreme Court of Iowa, pp. 26-27, M. Harold Ezzone by counsel accepts in lieu of new trial the remitted amounts of punitive damages, namely:

$18,000 against Willis Hansen
$ 2,500 against Dennis Hansen
$ 1,000 against the State Bank of Lawler

In filing this remittitur, however, M. Harold Ezzone notes that the Supreme Court left him no choice, but to do so:

(1) At page 26 of its amended opinion, the Supreme Court evinced the following fact findings:

> Upon our mandated review, *we consider* the punitive damage award to be greatly excessive. Although Ezzone convinced the jury he was manipulated by Riccardi into undertaking his deceitful conduct, *we think* the record clear, for punitive damages purposes, that his participation was provoking as well as provoked. *We think* that punitive damages awarded him are out of proportion to any amount needed, in addition to compensatory awards, for deterrence purposes. (*emph. supp.*)

Subsequently, by rehearing petition, Ezzone characterized this fact finding as appellate fact finding. In its response, the Supreme Court never indicated that this characterization was inaccurate. Even more subsequently, by a second motion to clarify, Ezzone questioned whether given such a fact finding, he could recover any more than the remitted amounts if he opted for a new trial. Since the Supreme Court declined to clarify this question, Ezzone has had to assume that if he cannot present a different punitive damages record on new trial, (which he cannot, at least without further clarification, *see*, ¶ 3, *infra*), then upon further appellate review, any punitive damages greater that [sic] the remitted amounts will continue to be found as fact by the appellate court as "greatly excessive" and "out of proportion to any amount needed, in addition to compensatory awards, for deterrence purposes". Therefore, it would be futile for Ezzone to pursue a new

trial to recover no more than the punitive damage amounts already remitted.

(2) Subsequent to the amended opinion filing, Ezzone also sought clarification as to whether any new trial would include the separately-affirmed issues of liability and resulting compensatory damages, as well as the issue of punitive damages. On 1/4/95, the Supreme Court entered an order clarifying that "an order for a new trial is an order for a complete new trial on all issues, as an original case." This clarification constituted a further form of coercion which stripped Ezzone of a meaningful choice between accepting remittitur of punitive damages and opting for a new trial on punitive damages.

(3) Subsequent to the amended opinion filing, Ezzone further sought clarification of the evidence and rationale upon which the Supreme Court based its conclusions of excessiveness and proportionality, specifically including what it meant by the new punitive damage factor of provocation. He did so because he needed to evaluate whether there was anything new or different that he could present in a new trial to gain a punitive damage award which would not be reduced again on appeal. On 1/11/95, the Supreme Court entered an order refusing to clarify, thus again depriving Ezzone of any meaningful and intelligent choice between accepting remittitur and opting for a new trial.

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cc: McCormick
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client

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served on each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein with postage fully paid and by depositing said envelope in a United States Post depository in Algona, Iowa, on this 23rd day of Jan 1995

/s/ Michelle Adams